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U.S. DEPT. OF JUSTICE

UNITED STATES OF AMERICA

CRIME RECORDS

76-4547

INTERNATIONAL TERMINAL OPERATING CO., INC.  
Baltimore, Maryland

Charles E. Taylor



UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D.C. 20535

TO THE DIRECTOR, FBI  
FROM THE SAC, BALTIMORE  
SUBJECT: [illegible]

1. [illegible]  
2. [illegible]  
3. [illegible]  
4. [illegible]  
5. [illegible]





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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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No. 76-

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INTERNATIONAL TERMINAL OPERATING CO., INC.,  
*Petitioner,*

vs.

CARMELO BLUNDO

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR,  
*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

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Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 1, 1976.

**OPINIONS BELOW**

This matter arises under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The Decision and Order of the Administrative Law

Judge, and the order amending the Previously Issued Decision and Order, were entered on March 3, 1975, and April 18, 1975, respectively, and appear at pages 49a and 60a as Appendices C and D to this Petition. (All page citations to the Appendices to this Petition are hereinafter preceded by the designation "A.") The Decision of the Benefits Review Board of the Department of Labor affirming the Decision and Order of the Administrative Law Judge and dated October 30, 1975, appears as Appendix B hereto (A. 45a). The majority and dissenting opinions and judgment of the Second Circuit Court of Appeals, decided July 1, 1976, affirming the Decision of the Benefits Review Board, have not been officially reported but are printed as Appendix A hereto (A. 1a). In addition, the opinions of three other Courts of Appeals which have not yet been officially reported but which are relevant to this case are printed as Appendices E (A. 62a), F (A. 90a) and G (A. 113a) hereto.

### **JURISDICTION**

The judgment of the Second Circuit Court of Appeals was entered on July 1, 1976 (A. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **QUESTIONS PRESENTED**

1. Whether the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act were intended to extend federal compensation coverage beyond the point where cargo is first unloaded onto an adjacent pier or similar facility.

2. Whether the 1972 Amendments to such Act were intended to extend coverage to a "stripper" of containers who was not employed by the unloader of the vessel, who was located at the time of injury in a building substantially removed from the unloading area and never used for loading or unloading of vessels, and whose sole duty at the time of the injury was to break down the

container for storage and Customs inspection—particularly where a substantial period of time had passed since the container had been unloaded at some other location.

3. Whether the situs of the accident in this case and the status of the injured employee were such as to meet the requirements of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

### STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(a):

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903(a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but

only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). \* \* \*

### STATEMENT OF THE CASE

Petitioner International Terminal Operating Company ("ITO") conducts two distinct types of operations in the New York area. One is stevedoring—the loading or unloading of cargo from ships. That operation by ITO is not involved in this case. The other activity is as a terminal operator, including, under contract with other companies, the consolidation or breaking down of cargo which has been or will be shipped on the lines of other carriers. That is the activity involved here.

On January 18, 1974, one of ITO's employees, respondent Blundo, was injured while working as a "checker" at a pier at 19th Street in Brooklyn (CA A. 38a, 45a-46a).<sup>1</sup> The area where he was working was a large one. The pier runs approximately 1000 feet from 19th to 21st Streets and extends approximately 700 feet from the foot of these streets to the seaward edge of the area (CA A. 37a).<sup>2</sup> Cargo is loaded and unloaded from vessels at the seaward edge of the 21st Street pier, but never at the 19th Street pier (CA A. 38a, 54a-55b, 81a; A. 31a n. 19). Nor was the cargo involved in this case unloaded at either the 19th or 21st Street piers.

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<sup>1</sup> "CA A." refers to the Appendix filed in the Court of Appeals, which includes, *inter alia*, the transcript of respondent Blundo's hearing.

<sup>2</sup> The area is fenced in and has two gates (CA A. 35a).

Instead, sometime prior to Mr. Blundo's accident, the particular container at issue<sup>3</sup> had been unloaded from some ship at some destination quite distant from the 19th Street pier. Although no one involved in the accident knew how long ago the container had been unloaded, there was testimony that it could take a week or considerably longer for such containers to reach the 19th Street pier after being unloaded in other sections of New York (CA A. 62a-64a, 69a-70a, 82a). No one involved in the accident knew the name of the ship which had carried the container or which company had unloaded it (CA A. 62a, 81a). It is clear, however, that the unloader had *not* been ITO (CA A. 48a, 55a, 56a, 67a-68a, 81a, 94a).

After the container had been unloaded, it had been carried with other cargo over the public streets to the 19th Street pier by a common carrier trucking company, driven by Teamsters Union members (CA A. 55a-56a, 80a). Sometimes, after delivery at 19th Street, cargo is picked up directly by the consignee, using his own trucks (CA A. 84a-85a). In this instance, however, since duty was owed on this particular container, it had to be "stripped," or broken down, and sent to a bonded warehouse located on the pier for passage by Customs officials before being picked up by the consignee or consignees (CA A. 46a, 97a-98a, 101a, 118a). This stripping was being performed by ITO under contract with American Export Lines, Inc., which owned the container (CA A. 40a, 55a, 68a-69a, 116a).

As a "checker," Mr. Blundo's job was to break the seal around the container, check the contents against his manifest sheet (which showed a description of the cargo, the

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<sup>3</sup> A container is a large crate into which smaller crates, boxes, bags, barrels or other such packages are consolidated for shipment to a single destination, even though the various contents may be meant for multiple consignees (CA A. 82a-85a).



consignee, the value, etc.), and to mark each item as "stripped" (CA A. 69a-73a). These duties are performed in a building used exclusively for storage and stripping and *not* in an area used for the loading or unloading of ships (CA A. 68a, 79a-80a; A. 31a n.19). After the checking, the cargo is then placed on pallets and sent to the bonded warehouse until cleared by Customs and picked up by the consignee or consignees (CA A. 71a, 85a). It was while Mr. Blundo was engaged in the checking process that he slipped on some ice and was injured (CA A. 52a).<sup>4</sup>

Under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, employees who are not covered by the Act are paid under state workmen's compensation laws. In order to be covered by the federal statute, several criteria must be met. Thus, the employee must meet the "status" test as someone engaged in maritime employment, as defined in Section 2(3), and the injury must meet the "situs" test as having occurred upon navigable waters, as defined in Section 3(a).<sup>5</sup>

The Administrative Law Judge and the Benefits Review Board, both of the Department of Labor, held that Mr. Blundo was engaged in maritime employment at the time of his injury and was thus an "employee" as defined by the Act, and that the place of the injury was "upon the navigable waters of the United States" as that term

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<sup>4</sup> Blundo testified that on other occasions he spent as much as 20% of his time performing on-vessel duties (CA A. 43a-44a). This fact was not even mentioned, much less considered important, by either the Administrative Law Judge or the Benefits Review Board in their opinions, and would appear to have been immaterial to the majority below. And yet as to Caputo, who was loading cargo aboard a consignee's truck when he was injured, his similar on-vessel experience was one of *the* crucial factors in the finding by the court below that he was covered by the Act (A. 36a, 39a-40a).

<sup>5</sup> The employer must also meet the test set forth in Section 2(4). However, in this case, petitioner had never questioned that it was an "employer" under the Act, since some of its other employees were engaged in longshoring operations (see A. 54a).



is defined in the 1972 Amendments to the Act (A. 57a, 46a).

These findings were made despite the facts, as set forth above, that:

- (a) ITO did not unload the ship.
- (b) The unloading was done in an area substantially removed from the scene of the accident.
- (c) The container at issue was subsequently carried over the city streets by common carrier.
- (d) It might have been a week or longer before the container reached the 19th Street pier after being unloaded from its vessel.
- (e) The container was not owned by ITO.
- (f) The container was "stripped" in a building not used for loading or unloading ships.
- (g) ITO does not load or unload ships at the 19th Street pier.
- (h) The injured party's sole duties revolved about checking the contents of the container.
- (i) The only step that remained was for the cargo to be passed by Customs officials and picked up by a consignee or consignees.

The Second Circuit split two to one in regard to respondent Blundo. As discussed more fully below, Judges Friendly and Oakes held that Blundo's injury met the "situs" test of the 1972 Amendments (A. 30a n. 19), and that he was covered by the Act because he had stripped the container prior to the point where the consignee had begun its movement from the pier (A. 39a).

Judge Lumbard dissented as to Blundo. He would have held that the 1972 Amendments were meant to extend only to those employees engaged in loading or unloading

activities between the vessel and the first point of rest if the cargo is being unloaded from the vessel, or the last point of rest if the cargo is being loaded aboard the vessel (A. 42a, 43a).

### REASONS FOR GRANTING CERTIORARI

As the Solicitor General has noted in a memorandum in another case pending before the Court,<sup>6</sup> and as the courts themselves have acknowledged, a direct conflict exists among the Circuits on the issue of where compensation coverage under the Act ends for injuries occurring to workmen engaged in handling cargo after that cargo has been unloaded from a vessel and onto the land.

Both the Second Circuit in the instant case and the First Circuit in *Stockman v. John T. Clark & Son of Boston, Inc.*, decided July 27, 1976, and reprinted herein at A. 62a, have virtually invited this Court to resolve the divergences of opinion that have arisen as a result of the 1972 Amendments. In the decision below, after noting that the four cases decided in the same opinion "present a question of considerable importance" (A. 3a-4a), Judge Friendly said: "Given the importance of the question, the

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<sup>6</sup> Memorandum for the Federal Respondent at 8, *Gilmore v. Weyerhaeuser Co.*, No. 75-1620. The Solicitor General said that "[t]he new shoreside coverage of the Act has produced a great deal of litigation, \* \* \* and there is already a conflict among the circuits concerning the meaning of 'maritime employment' as applied to injuries on land" (footnote deleted). Although the Solicitor General's statement was made before the Fourth Circuit's in banc decision in *I.T.O. Corp. of Baltimore v. Benefits Review Board* (August 26, 1976; reprinted herein at A. 113a), the conflict persists following that decision.

The *Gilmore* case involved injuries on navigable waters, and therefore a resolution of its problems would not solve the on-land injury problems of this and the other cases discussed herein. As we shall show, however, some of the language in the Ninth Circuit opinion in *Gilmore (Weyerhaeuser Co. v. Gilmore)*, 528 F.2d 957 (1976), does help to illustrate the confusion surrounding the Act's 1972 Amendments.

number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said" (A. 4a-5a). The First Circuit made it a point to quote this precise same language in *Stockman*, calling the present situation in regard to the 1972 Amendments a "judicial melange" (A. 70a).

The *Stockman* court also noted that that case raised "a difficult question of interpreting the 1972 Amendments \* \* \*" (A. 63a), and that the difficulty of determining coverage arose from "the essential ambiguity of the 1972 Amendments insofar as they describe, or fail to describe, the employees for whom coverage is afforded" (A. 64a). The House and Senate Reports, the court said, "go only part way towards clarifying the application of the 1972 amendments in the present situation" (A. 83a). It said that "judicial decisions to date construing the 1972 amendments reflect a sharp difference of opinion over the reach of the Act" (A. 69a).

In *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, decided August 5, 1976 (remanded to Board), and reprinted herein at A. 90a, the Third Circuit described its attempted interpretation of the 1972 Amendments as "a task of no little difficulty as several diverging opinions demonstrate" (A. 99a) and added: "We concede, as we must, that the draftsmanship of the 1972 amendments leaves something to be desired and, to a certain extent, obscures [the court's own conception of the Congressional purpose] from view" (A. 107a). And in *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 529 F.2d 1080 (1975), the Fourth Circuit granted a petition for rehearing and decided the case in banc "[b]ecause of the importance and novelty of the questions decided" relating to coverage of on-land injuries. *I.T.O. Corp. of Baltimore v. Benefits Review*

*Board*, decided August 26, 1976, and reprinted herein at A. 113a, 117a.

Thus, the courts that have been faced by the questions presented by the instant case have repeatedly recognized that these questions are important and recurring ones, that a resolution of them by reference both to the language of the 1972 Amendments themselves and to their legislative history is extremely difficult, and that divergences of opinion in regard to how the 1972 Amendments should be interpreted redound throughout the Circuits. We submit that a failure by this Court to resolve these questions at an early date will merely result in further confusion and wasted time for Administrative Law Judges, the Benefits Review Board, and the various Courts of Appeals—including those which currently have similar questions under review.<sup>7</sup>

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<sup>7</sup> *Second Circuit:*

*Norat v. United Terminals, Inc.*, 3 BRBS 337 (March 23, 1976), appeal docketed, No. 76-4126 (2d Cir., filed May 14, 1976).

*Third Circuit:*

*Maxin v. Dravo Corporation*, 2 BRBS 372, (Oct. 20, 1975), appeal docketed, No. 75-2403 (3rd Cir., filed Dec. 16, 1975); *Suarez v. Sea-Land Service, Inc.*, 3 BRBS 17 (Nov. 18, 1975), appeal docketed, No. 76-1033 (3rd Cir., filed Jan. 2, 1976); *Farrell v. Maher Terminals, Inc.*, 3 BRBS 42 (Dec. 10, 1975), appeal docketed, No. 75-1145 (3rd Cir., filed Feb. 6, 1976); *Bradshaw v. J.A. McCarthy, Inc.*, 3 BRBS 195 (Jan. 26, 1976), appeal docketed, No. 76-1146 (3rd Cir., filed Feb. 6, 1976); *Lind v. Independent Pier Co.*, 3 BRBS 232 (Feb. 19, 1976), appeal docketed, No. 76-1229 (3rd Cir., filed Feb. 25, 1976); *Muldowney v. Lavino Shipping Co.*, 3 BRBS 229 (Feb. 19, 1976), appeal docketed, No. 76-1404 (3rd Cir., filed April 2, 1976); *Fairman v. J. A. McCarthy, Inc.*, 3 BRBS 239 (Feb. 23, 1976), appeal docketed, No. 76-1258 (3rd Cir., filed March 4, 1976); *Santumo v. Sea-Land Service, Inc.*, 3 BRBS 262 (Feb. 27, 1976), appeal docketed, No. 76-1521 (3rd Cir., filed April 20, 1976); *Cabrera v. Maher Terminals, Inc.*, 3 BRBS 297 (March 10, 1976), appeal docketed, No. 76-1561 (3rd Cir., filed April 30, 1976).

[Footnote continued on page 11]

There is no question but that the 1972 Amendments were intended to extend compensation benefits in some fashion and to modify this Court's prior ruling that benefits could be afforded solely on account of death or injuries not reachable by state workmen's compensation laws—that is, those beyond the pier on the seaward side.

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<sup>7</sup> [Continued]

*Fifth Circuit:*

*Perdue v. Jacksonville Shipyards, Inc.*, 1 BRBS 297 (Jan. 31, 1975), *appeal docketed*, No. 75-1659 (5th Cir., filed March 13, 1975); *Ford v. P. C. Pfeiffer Company, Inc.*, 1 BRBS 367 (March 21, 1975), *appeal docketed*, No. 75-2289 (5th Cir., filed May 19, 1975); *Nulty v. Halter Marine Fabricators, Inc.*, 1 BRBS 437 (May 2, 1975), *appeal docketed*, No. 75-2317 (5th Cir., filed May 20, 1975); *Skipper v. Jacksonville Shipyards, Inc.*, 1 BRBS 533 (June 11, 1975), *appeal docketed*, No. 75-2833 (5th Cir., filed July 11, 1975); *Bryant v. Ayers Steamship Company*, 2 BRBS 408 (Nov. 13, 1975), *appeal docketed*, No. 75-4112 (5th Cir., filed Nov. 18, 1975); *Luker v. Ingalls Shipbuilding*, 3 BRBS 321 (March 19, 1976), *appeal docketed*, No. 76-2157 (5th Cir., filed April 29, 1976); *Kininess v. Alabama Dry Dock and Shipbuilding Company*, 4 BRBS 13 (May 18, 1976), *appeal docketed*, No. 76-2505 (5th Cir., filed June 1, 1976).

*Seventh Circuit:*

*Richardson v. Great Lakes Storage and Contracting Co.*, 2 BRBS 31 (June 26, 1975), *appeal docketed*, No. 75-1786 (7th Cir., filed Aug. 25, 1975).

*Eighth Circuit:*

*Maybes v. St. Louis Shipbuilding Company*, 3 BRBS 450 (April 29, 1976), *appeal docketed*, No. 76-1530 (8th Cir., filed June 25, 1976).

*Ninth Circuit:*

*Powell v. Cargill, Inc.*, 1 BRBS 503 (May 30, 1975), *appeal docketed*, No. 75-2655 (9th Cir., filed July 28, 1975); *Kelley v. Handcor, Inc.*, 1 BRBS 319 (Feb. 28, 1975), *appeal docketed*, No. 75-1943 (9th Cir., filed April 28, 1975); *Herron v. Brady-Hamilton Stevedore Company*, 1 BRBS 273 (Jan. 23, 1975), *appeal docketed*, No. 75-1538 (9th Cir., filed March 7, 1975); *Mezzina v. Marine Terminals Corp.*, 2 BRBS 401 (Nov. 12, 1975), *appeal docketed*, No. 76-1041 (9th Cir., filed Jan. 9, 1976).



*Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); see also *Victory Carriers v. Law*, 404 U.S. 202, 216 (1971). The problem is: how far did Congress intend to extend coverage? Certainly, as the Ninth Circuit said in *Gilmore*, "[i]n expanding the maritime situs element of the Act, \* \* \* Congress clearly did not intend to broaden the class of covered employees to include *anyone* injured in an adjoining area" (528 F.2d at 960; emphasis in the original).\*

To date, the various Court of Appeals judges who have considered the question have developed the following conflicting theories:

(a) The earliest views were expressed by Judges Kilkenney, Goodwin and East in the *Gilmore* case. That case, although it dealt with an injury on navigable waters, nevertheless is relevant here in terms of the way the court read certain portions of the 1972 Amendments. The court interpreted the definition of "employee" and the section dealing with injuries occurring upon "navigable waters" (as expanded by the Amendments) to mean that at the time of his injury, the employee, to be covered by the Act, must have been engaged in work realistically related to "the traditional work and duties of a ship's service employment," regardless of whether his employer was a maritime employer (528 F.2d at 961). Thus, the court felt that while the definition of situs, or "navigable waters," had been expanded, the class of employees covered had not been expanded. Since the claimant there, though working on navigable waters, was performing logging work unrelated to the maritime functions of loading or unloading a vessel, he was not covered (*id.* at 961-962). Under this interpretation, the respond-

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\* See also E. Vickery, "Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act," *Ins. Counsel J.* 63, 68 (January 1974); Comment, "Broadened Coverage Under the LHWCA," 33 *La. L. Rev.* 683, 693 (1973).



ent Blundo in the instant case would also not have been covered.

(b) Judges Winter, Haynsworth and Russell in the Fourth Circuit and Judge Lumbard in the Second Circuit disagreed with *Gilmore* in the sense that they thought that the 1972 Amendments did extend coverage, to some degree, to persons not theretofor covered. However, they agreed that the work performed still had to be maritime in nature and that not every person handling cargo between the vessel and the point of discharge to the consignee or point of receipt from the shipper was engaged in maritime employment. On the contrary, they deduced—we believe, correctly—that what Congress intended was to extend coverage to those engaged in longshoring operations when the injury occurred between the ship and, in the case of unloading, the first storage or holding area on a pier, wharf, or terminal adjoining navigable waters, or, in the case of loading, from the last storage or holding area on the pier, etc., to the ship (A. 117a, 41a). This is the “point-of-rest” principle.

By way of example, all three employees in the *Benefits Review Board* case were deemed by the court to be performing functions in the overall loading or unloading of vessels (529 F.2d at 1082). In fact, however, in each case the employee was moving cargo on a vehicle after being unloaded from the vessel and before being picked up by the consignee, or after delivery by the consignee but before being loaded aboard the vessel. Judges Winter, Haynsworth and Russell (and presumably Judge Lumbard) felt that the “situs” test had been met because all three employees had been injured at a terminal, adjoining navigable waters, used in the overall loading and unloading process. However, since each injury had occurred beyond the first or last point of rest, the claimants were not maritime employees at the time of their injuries and had not met the status requirement of the Amendments.

The fact that an employee might have been actually engaged in loading or unloading ships at some *other* periods of his employment was entirely irrelevant; his duties at the time of his accident were determinative of coverage (529 F.2d at 1088 n. 4; A. 117a-118a). Under the view of these judges, respondent Blundo would not have been covered, since his injuries occurred beyond the first point of rest.

(c) Judges Craven and Butzner in the Fourth Circuit and Judges Aldisert, Gibbons and Garth in the Third Circuit rejected the point-of-rest principle and concluded that waterborne cargo remains in maritime commerce until it is picked up by the consignee, and enters maritime commerce when it is delivered by the shipper to the terminal facilities. Thus, in their view, the "loading and unloading" process is a continuous one in the terminal areas involving everyone who handles the cargo in any fashion (529 F.2d at 1092-97; A. 118a-119a, 108a-110a).

Judges Aldisert, Gibbons and Garth conceded that their "terminology" was somewhat different from Judge Craven (A. 108a) and that they were virtually reading the situs requirement out of the Act. Situs, they said, related to where the *vessels* were and not to the situs of the maritime employees at the time of injury (A. 107a), so that even someone driving a truck over public roads between storage areas could be covered (A. 109a-110a). Their *Sea-Land Service* case had to be remanded solely because it was unclear whether the injured employee was trucking a full or empty crate and what the source and destination of the delivery were (A. 119a). Under the theory of this group of judges, respondent Blundo would have been covered under the Act.

(d) Judge Widener of the Fourth Circuit had a variation on this theme—although his views are not entirely clear. He seemed to be saying that while coverage extends beyond the cargo's point of rest, it does not extend

all the way from delivery to the consignee or receipt from the shipper. Rather, if the injury occurs, for example, while the cargo is being moved from its last storage point to the point where the consignee's truck awaits it, there is no coverage because the transfer is for the convenience of the consignee, even though the stevedore's employees are still handling the cargo, and the cargo has not been turned over to whomever the consignee has sent to pick it up (A. 117a-118a). It would appear that respondent Blundo would have been covered under this theory, but it is clear that the opposite would be true of Caputo—a claimant in a case which was decided by the court below in the same opinion covering Blundo—because Caputo was actually helping a consignee's truckdriver load cargo inside the consignee's truck (A. 11a).<sup>9</sup>

(e) Judges Friendly and Oakes of the Second Circuit in the ruling below felt that as to situs, any pier or terminal next to water satisfied the statutory requirement, even if the particular pier or terminal was not used for the loading or unloading of vessels (A. 30a-31a n. 19). They rejected the point-of-rest principle (A. 32a-33a) and instead devised a test whereby there was at least coverage for all persons meeting the situs requirements who are engaged in stripping or stuffing containers or who are engaged in the handling of cargo "up to the point where the consignee has actually begun its movement from the pier (or, in this case of loading, from the time when the consignee has stopped his vehicle at the pier), *provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel*" (A. 39a-40a; emphasis added). Thus, (a) it was the employee's *general responsibilities*, as opposed to his re-

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<sup>9</sup> The court below nevertheless concluded, under its own theory and contrary to what Judge Widener apparently would have concluded, that Caputo *was* covered (A. 11a, 42a).

sponsibility at the time of the accident, that counted (A. 32a, 36a), and (b) under their formulation, an employee could be covered even if working inside the consignee's pick-up truck or the shipper's delivery truck (A. 37a). These judges admitted that this test "goes some way in [the] direction" of reading the status requirement out of the Act (A. 40a). Under the majority's ruling, of course, respondent Blundo was deemed covered by the Act.

(f) Judges Coffin, McEntee and Campbell of the First Circuit, in *Stockman*, dealing with an injured employee substantially in the same position as that of respondent Blundo in the instant case, thought not only that the House and Senate Reports were unclear in situations such as these but that "\* \* \* Congress has seemingly gone out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process \* \* \*" (A. 83a). The *Stockman* panel also conceded that "\* \* \* Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees" (A. 87a).<sup>10</sup> Nevertheless, these judges joined in the interpretation of the Amendments formulated by Judges Friendly and Oakes, with the exception that they refused to pass on the question of whether *any* class of employees—whether the "cargo handlers" in the Second Circuit case or "strippers" like *Stockman* and *Blundo*—had to show that they had "spent a significant part of [their] time in the typical longshoring activity of taking cargo on or off a vessel" (A. 87a-89a). Under the

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<sup>10</sup> The First Circuit broadly interpreted situs to include a terminal which was "generally part of the same Boston waterfront area" as the point where the unloading took place. In fact, the terminal was two miles over land from the unloading site, the cargo had been unloaded three days prior to the accident, and the cargo had been brought to the accident site by an independent trucking firm (A. 65a, 77a-78a).

*Stockman* view, Blundo would have been covered by the Act.

Thus, it is clear that a wide variety of interpretations have developed in regard to what the 1972 Amendments actually cover. But the differences between the judges go far beyond their disagreement over the basic coverage question. They have not even been able to agree on what standards, tests or criteria should be used in deciding the coverage question. A few examples will suffice:

(1) Judges Craven and Butzner believe that great deference is due to the views of the Benefits Review Board, which has consistently applied a broad interpretation of the Act (529 F.2d at 1091-94; A. 118-119). However, both the majority in the instant case (A. 24a-27a) and the panel in *Stockman* (A. 71a-72a) felt that no special deference was due the Board. As Judge Friendly pointed out, the Board is not a policy-making group, and, moreover, its later decisions all rested on early conclusions which were not grounded in experience (A. 24a-27a). The *Stockman* panel agreed (A. 71a).

(2) The majority in the original *Benefits Review Board* decision thought that the views of the Secretary of Labor were significant (529 F.2d at 1084), the majority in the instant case thought his views were not dispositive of the issues (A. 28a-29a), and the *Stockman* panel felt that the Secretary's views were even less significant than those of the Board (A. 72a-73a).

(3) Judges Craven and Butzner in *Benefits Review Board* accorded great weight to the statutory presumption, Section 20, 33 U.S.C. § 920, that a claim falls within the Act (529 F.2d at 1091; A. 118a-119a); the majority in the initial decision in that case ignored the presumption entirely (529 F.2d at 1081-89; see also A. 116a-118a); the majority in the instant case felt that the presumption did not apply to interpretative questions such as those involved here (A. 23a-24a), and the



*Stockman* panel concluded that the presumption was entitled to no weight whatever (A. 71a).

(4) The *Gilmore* panel felt that the union to which the claimant belonged was an important factor (528 F. 2d at 962), as did the *Stockman* panel (A. 66a-78a), whereas the *Sea-Land Service* court reasoned that this factor was of no consequence (A. 110a), and the majority below apparently adopted the same view (A. 33a).

(5) Finally, both courts and commentators have differed over the Amendments' legislative history. Judges Winter, Haynsworth, Russell, Lumbard, Aldisert, Gibbons, Garth, Friendly, Oakes, Kilkenny, Goodwin and East have all relied heavily upon the legislative history<sup>11</sup> but have reached a variety of divergent interpretations of that history and have produced differing results therefrom. Judges Craven and Butzner believe that it is error even to resort to legislative history, but that if it is resorted to, the legislative history is so ambiguous as to be virtually useless (529 F.2d at 1090, 1095; A. 118a).<sup>12</sup> The *Stockman* court reviewed the legislative history but then concluded that " \* \* \* Congress has seemingly gone

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<sup>11</sup> 529 F.2d at 1086-88; A. 117a; 43a; 104a-108a; 31a-40a; 528 F.2d at 960.

<sup>12</sup> The difficulty with the House and Senate Reports can be illustrated by the following excerpt:

The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. [See A. 33a-34a.]

While we would submit that this language would clearly exclude someone like respondent Blundo from coverage, some judges have interpreted this same language in completely the opposite way in order to provide coverage for someone in Blundo's position. (See discussion above.)



out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process just as it is silent on the status of other terminal employees engaged in moving, storing and culling cargo on the pier" (A. 83a).<sup>13</sup> Two commentators take the position that the legislative history should be ignored entirely (G. Gilmore & C. Black, *The Law of Admiralty* § 6.51 at 430 (2d ed. 1975)).

We submit that this is an appropriate time for this Court to adopt the suggestion of several of the Courts of Appeals and to clear up all this confusion surrounding the 1972 Amendments.<sup>14</sup>

We recognize that an argument on the merits is more appropriately reserved for petitioner's brief after certiorari is granted. We would merely point out here, however, that while the majority below repeatedly speaks of the need for "a uniform compensation system" (A. 33a, 36a) and "uniformity of coverage" (A. 35a, 38a)

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<sup>13</sup> The *Stockman* court nevertheless proceeded to attempt to draw certain conclusions from the legislative history—conclusions which we believe to be erroneous (A. 83a-86a).

<sup>14</sup> Both the majority below and the *Sea-Land Service* panel commented unfavorably upon the lack of full records relating to all aspects of the loading and unloading process (A. 21a-23a, 99a, 109a-110a). However, in the light of the large number and frequency of cases coming before the Administrative Law Judges, the expenses involved in developing complete records in any one case, and the wide disparity of practices performed at various terminals around the country, the chances of presenting better and more complete records to this Court in other cases at some point in the future are very slim. Moreover, the less-than-complete records referred to by both groups of judges did not prevent those judges from expressing their views on the basic coverage questions—and this was true even in *Sea-Land Service*, where the case was remanded for a more complete record. We submit that the facts both as to respondent Blundo individually and as to practices generally in the industry as they appear from the various cases are more than sufficient to allow this Court to decide the basic issue of what Congress intended as to the scope of coverage under the 1972 Amendments.

as opposed to “‘incongruous results’” (A. 29a) and “‘disparity in benefits’” (A. 32a), in fact the application of the theory developed by the majority below to the practices described in these various cases would have exactly the opposite effect from the desired uniformity.

Ships contract with stevedores to load and unload their vessels. Stevedores employ longshoremen from union hiring halls to physically accomplish this work. The stevedore may or may not also be a terminal operator, but terminal operators have entirely separate functions. They receive outbound cargo from stevedores, storing the cargo for indefinite periods<sup>15</sup> and ultimately tendering it to inland consignees. (The reverse procedure applies when the terminal operators receive cargo from inland shippers and, after storage, tender it to stevedores to be loaded on ships.) The delineation between the functions of stevedores and terminal operators is best described by the industry practice associated with the term “point of rest.” That point is an explicit one; it clearly divides traditional longshoremen’s work—taking cargo on and off vessels—from the myriad activities that are undertaken by terminal operators beyond that point.<sup>16</sup> The standard devised by the majority below and those adopted by the other judges who have not accepted the point-of-rest principle will not bring uniformity of coverage but rather the widest possible disparity in results. When, for example, will an employee handling cargo be deemed

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<sup>15</sup> In one of the cases dealt with by the court below, the cargo had remained “stored” on the pier for 133 days (A. 37a n. 24).

<sup>16</sup> See *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 at 511, 512 (1966); *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887, 888 (D.C. Cir. 1962). For a detailed description and analysis of the stevedoring industry as it exists in various ports of the United States, see “The Stevedore & Marine Terminal Industry of the United States,” a study prepared by the National Association of Stevedores (1974 and 1974-75 eds.)

to have spent "a significant part of his time" taking cargo on or off a vessel? Is someone who has spent 50 percent of his time in such work to be held covered by the Act, while someone is held excluded from coverage when he has suffered precisely the same injury at precisely the same point doing precisely the same job, but who has at other periods spent only 20 percent of his time in loading or unloading vessels? And does coverage really apply, so long as the situs requirements are met, to anyone handling cargo, including those helping the consignee load his trucks many weeks after the cargo has been unloaded from the vessel? Such a definition could theoretically cover even Teamster drivers carrying cargo over the public roads. In a brief on the merits petitioner can demonstrate that this was never the intent of the Congress<sup>17</sup> and that the hoped-for uniformity<sup>18</sup> can only be achieved by the application of the point-of-rest principle.

The situation as it now exists is indeed a serious one. Approximately 800,000 workers are potentially within the coverage of the Act.<sup>19</sup> The 1972 Amendments have resulted in a huge increase in the number of longshore injuries reported under the Act. In FY 1972, the year preceding enactment of the Amendments, 57,940 longshore and harbor workers' injuries were reported to the

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<sup>17</sup> See J. Doak & A. Hecker, "Is It a New Ball Game?—The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, XI The Forum 544, 549-550 (Winter 1976). One of Congress's intentions was to respond to high insurance costs under the old system. See Note, "Maritime Jurisdiction and Longshoremen's Remedies," 3 Wash. U.L.Q. 649, 666 (Summer 1973). Yet insurance costs under the new decisions have soared to the point where a company like Pittston Stevedoring Corporation, one of the parties in the court below, has had to reduce drastically its stevedoring activities in the New York area.

<sup>18</sup> See Note, 4 Rutgers Camden L.J. 404, 412-413 (Fall 1972).

<sup>19</sup> See J. Doak & A. Hecker, *supra*, XI The Forum at 544.

Labor Department's Office of Workers' Compensation Programs (OWCP).<sup>20</sup> In FY 1974, the first full year of operation under the Amendments, the number of reported cases rose to 136,818, an increase of over 136% (*id.*). In FY 1975, 150,111 longshore injuries were reported, 159% more than in FY 1972 (*id.*).

During this same period, the number of longshore cases eligible for the filing of claims (new "lost time" cases) rose even more rapidly, from 12,003 in FY 1972 to 31,459 in FY 1975, an increase of 162%.<sup>21</sup> The increased number of claims against employers and insurance companies has in turn brought about an increased number of appeals to the OWCP. In FY 1976, the OWCP held approximately 8300 claims conferences on disputed longshore claims, and 743 such cases were referred to Administrative Law Judges for disposition (*id.*). As of September 1, 1976, 464 claims under the Act were pending before Administrative Law Judges in the Department of Labor.<sup>22</sup>

A substantial share of the increased caseload under the Act is directly attributable to the shoreward extension of jurisdiction effected by the 1972 Amendments. By FY 1975, 51% of all longshore injuries reported to the OWCP were classified as arising under the extended

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<sup>20</sup> "Federal Employees' Compensation Act and the Longshoremen's and Harbor Workers' Compensation Act and Extensions, Annual Statistical Report for All Districts Combined, Fiscal Year 1975," compiled by Employment Standards Administration, Office of Administrative Management, U.S. Department of Labor, at 4.

<sup>21</sup> Information obtained from Mr. Donald L. Kress, Chief, Branch of Workers' Compensation Statistics, Division of Management Information and Computer Systems, Office of Administrative Management, Employment Standards Administration, U.S. Department of Labor.

<sup>22</sup> Information obtained from Office of Administrative Law Judges, Department of Labor.

coverage created by the 1972 Amendments.<sup>23</sup> In FY 1976, the percentage of shoreside injuries increased to 57%.<sup>24</sup> As of September 15, 1976, there were 131 longshore injury cases pending before the Benefits Review Board, one-third of which involve the issue of shoreside coverage under the Act.<sup>25</sup> It is apparent that the frequent litigation of this issue is the result of uncertainty as to the proper scope of the new shoreside coverage. That uncertainty and the litigation which it has encouraged are reflected also in the dockets of the Courts of Appeals, where, as noted above, 23 separate cases involving shoreside coverage under the Act are now pending (see n. 7, *supra*).

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<sup>23</sup> "Effect of 1972 Amendments on Injuries Reported Under Longshore and Harbor Workers' Compensation Act, Comparison of Old and Extended Coverage, Fiscal Year 1975," prepared by Branch of Workers' Compensation Statistics, July 22, 1975. (Reprinted in Appendix H hereto.)

<sup>24</sup> "Effect of 1972 Amendments on Injuries Reported Under Longshore and Harbor Workers' Compensation Act, Comparison of Old and Extended Coverage, Fiscal Year 1976," prepared by Branch of Workers' Compensation Statistics, August 1976, (Reprinted in Appendix H hereto.)

<sup>25</sup> The pending longshore injury cases were identified from an examination of the docket of the Benefits Review Board, and an analysis of the Administrative Law Judge decision in each pending case under the Act. The analysis of the Administrative Law Judge decisions in these cases also revealed those Benefits Review Board appeals in which shoreside jurisdiction is an issue.



CONCLUSION

We respectfully urge the Court, for all of the reasons set forth above, to grant certiorari, reverse the decision below, and definitively interpret the 1972 Amendments so as to put an end to the present confusion and the waste of administrative and judicial time and energy that is presently being devoted to this difficult subject.

Respectfully submitted,

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2-11-11

Supreme Court, U. S.  
FILED

SEP 28 1976

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76- **76 - 454**

INTERNATIONAL TERMINAL OPERATING CO., INC.,  
*Petitioner,*

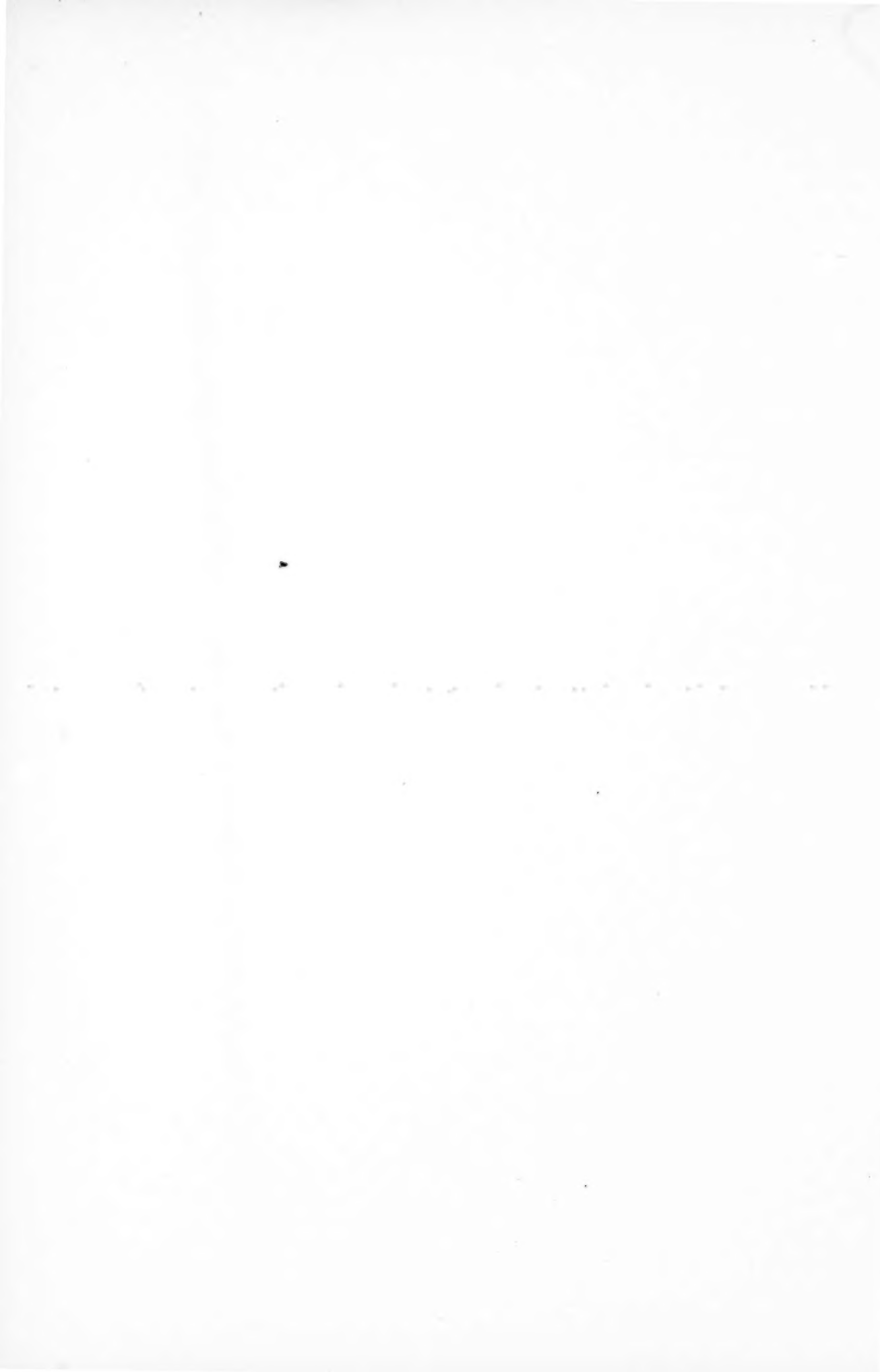
vs.

CARMELO BLUNDO

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR,  
*Respondents.*

APPENDIX TO PETITION FOR A  
WRIT OF CERTIORARI



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APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SEPTEMBER TERM, 1975

Nos. 1004, 1014, 1044, 1111

Argued May 20, 1976

Decided July 1, 1976

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Docket No. 76-4042

PITTSTON STEVEDORING CORPORATION and  
THE HOME INSURANCE COMPANY,  
v. *Petitioners,*

ANTHONY DELLAVENTURA,  
and *Respondent,*

DIRECTOR, OFFICE OF WORKERS COMPENSATION  
PROGRAMS, U.S.D.L.,  
*Party in Interest.*

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Docket No. 76-4009

NORTHEAST MARINE TERMINAL COMPANY, INC., Employer  
and

STATE INSURANCE FUND, Carrier,  
v. *Petitioners,*

RALPH CAPUTO, Claimant  
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,  
*Respondents.*

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2a

Docket No. 76-4043

PITTSTON STEVEDORING CORPORATION,  
*Petitioner,*

v.

JOHN SCAFFIDI,  
*Respondent.*

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Docket No. 75-4249

CARMELO BLUNDO,  
*Claimant-Respondent,*

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,  
*Self-Insured Employer—Petitioner,*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,  
*Respondent.*

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Before LUMBARD, FRIENDLY and OAKES, Circuit  
Judges.

Petition to review four orders of the Benefits Review Board granting awards under the Longshoremen's and Harbor Workers' Compensation Act. One petition is dismissed as untimely and a second as having been mooted by payment of the award by the insurance carrier; the other two awards are affirmed.

Joseph F. Manes, Esq., Croton-on-Hudson, N.Y., for  
Pittston Stevedoring Corporation and The Home  
Insurance Company.

William M. Kimball, Esq., New York, N.Y. (Burlingham Underwood & Lord, Esqs., of Counsel), for Northeast Marine Terminal Company and State Insurance Fund.

Leonard J. Linden, Esq., New York, N.Y. (Linden & Gallagher, Esqs., of Counsel), for International Terminal Operating Company, Inc.

Angelo C. Gucciardo, Esq., New York, N.Y. (Israel, Adler, Ronca & Gucciardo, Esqs., of Counsel), for Respondents Dellaventura, Caputo, Scaffidi and Blundo.

Ronald E. Meisburg, Esq., U.S. Department of Labor, Washington, D.C. (William J. Kilberg, Solicitor of Labor; Laurie M. Streeter, Associate Solicitor; Jean S. Cooper, Esq., and Francine K. Weiss, Esq., Department of Labor, of Counsel), for Director, Office of Workers' Compensation Programs.

Thomas W. Gleason, Jr., New York, N.Y. (Irwin Herschlag, Esq., New York, N.Y., of Counsel), for International Longshoremen's Association, AFL-CIO, *amicus curiae*.

Thomas D. Wilcox, Esq., Washington, D.C., for National Association of Stevedores, *amicus curiae*.

FRIENDLY, Circuit Judge:

We have here four petitions under 33 U.S.C. § 921(c), by employers, in some instances joined by their insurance carriers, to review orders of the Benefits Review Board (BRB) affirming compensation awards made to four employees under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, 33 U.S.C. §§ 901 et seq.<sup>1</sup> They present a question of con-

<sup>1</sup> The Benefits Review Board was created by the 1972 Amendments to the LHWCA as an independent, "quasi-judicial" body within the

siderable importance, namely, how far the 1972 Amendments extended the coverage of LHWCA.

Presented with the same general issue, a divided panel of the Fourth Circuit ruled in favor of the employers, *I.T.O. Corporation of Baltimore v. Benefits Review Board, U.S. Dep't of Labor and Adkins*, 529 F.2d 1080 (1975), holding that the Act extended benefits only to persons injured while unloading cargo from the ship to what the majority termed a "first point of rest," i.e., the first place where the cargo is deposited on a pier or terminal area after being unloaded, and to persons injured while loading cargo from the "last point of rest," 529 F.2d at 1081. The *I.T.O.* case has been reheard *en banc*. We are told that only one other circuit has construed the extended coverage provisions here at issue, *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9 Cir. 1975), rehearing denied, Feb. 6, 1976, petition for cert. filed, No. 75-1620, 44 U.S.L.W. 3645 (U.S. May 6, 1976), a case we do not consider to be truly relevant, but that the issue here presented is *sub judice* in the First Circuit, *John T. Clark & Son of Boston, Inc. v. William Stockman*, No. 75-1360, argued Jan. 5, 1976, and in the Fifth Circuit. Given the importance of the question, the number of courts of appeals endeavoring to find an

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Department of Labor. 33 U.S.C. § 921(b)(1); 20 C.F.R. § 801.103 (1975). Its three members are appointed by the Secretary of Labor, and it is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter," made by the administrative law judges who hear LHWCA claims in the first instance. 33 U.S.C. §§ 919(d), 921(b)(1) and (3) (as amended). Prior to the 1972 amendments, there was no administrative review procedure for LHWCA claims; cases were heard in the first instance by Deputy Commissioners and review was then had in the United States district courts. 33 U.S.C. § 921 (1970). Under the 1972 amendments cases are heard by an administrative law judge whose decisions are reviewed by the BRB, and appeals lie to the court of appeals directly from final orders of the BRB. 33 U.S.C. § 921(c).

answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said. In consequence we shall not dwell on the long history of the problem of affording appropriate remedies for longshoremen and harbor workers against their employers which had its inception in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917)—a history which is interestingly traced in Gilmore & Black, *The Law of Admiralty* §§ 6-45 to -49 (2d ed. 1975)—but will proceed directly to the cases in hand.

### I. The 1972 Amendments

The situation that led to adoption of the 1972 Amendments was described as follows in the portion of the Senate Report headed "Need for the Bill," S. Rep. No. 92-1125, 92d Cong., 2d Sess. 4-5 (1972):

Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.

The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.



For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.

The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose only support will be payments under the Act.

In practical terms the bill was a trade-off. See *Landon v. Lief Hoegh and Co., Inc.*, 521 F.2d 756, 761-62 (2 Cir. 1975), cert. denied, 96 S.Ct. 783 (1976). Stevedores and other employers were pushing for complete abolition of the three-way damage action possible under *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946), which held longshoremen and other harbor workers to be "seamen" entitled to sue the ship for unseaworthiness, and *Ryan Stevedoring Co., Inc. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), which permitted the shipowner to seek indemnity for any liability thus entailed from an injured worker's employer. This triangle in effect exposed the employer (already liable for and often having paid the limited benefits provided by the LHWCA) to an unlimited liability to the employee for damages and to the shipowner for its counsel fees in defending the employee's

suit. The unions representing longshoremen and other harbor workers, which for years had been seeking increased benefits under the Act, opposed Congressional repeal of their *Sieracki*-created status as "seamen" in part on the grounds that the LHWCA's benefits were so low that workers needed the additional protection of the "unseaworthiness" doctrine. The compromise between these positions effected by the 1972 Amendments was this: The *Sieracki* action for unseaworthiness was eliminated, longshoremen in the future could sue the ship only for negligence, and employers were immunized from indemnity suits by shipowners. 33 U.S.C. § 905 (b). In return, the workers were to secure increased benefits under LHWCA and, what is here pertinent, an extension of that statute's coverage. Thus the Senate Committee said that the principal purpose of the Amendments was "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate administrative reforms," Sen. Rep., *supra*, p. 1.

The change in the coverage section was dramatic. Before amendment the first sentence of 31 U.S.C. § 903 (a) read:

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

The Amendments altered this to read:

Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the

United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In place of the definition of "employee" previously contained in § 902(3) as "not includ[ing] a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net," the Amendments defined the term as follows: ✓

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The definition of "employer," § 904(4)

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

was modified by inserting after "navigable waters of the United States" the expansion of that term by the parenthetical phrase in § 903.<sup>2</sup>

Thus, under the Amendments there are two tests for coverage under the Act: a "situs" test requiring the injury to occur on the "navigable waters" as now defined, and a "status" test which requires that the employee be

<sup>2</sup> The significance of this definition is that liability for compensation is predicated on being an "employer," 33 U.S.C. § 904.

"engaged in maritime employment," etc. While the situs test has been liberalized, the creation of an employee status test adds a new element to the coverage requirements.<sup>3</sup> The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902(3)—"engaged in maritime employment" and "any longshoreman or other person engaged in longshoring operations."

## II. The Facts

Two of the cases before us, relating to claimants Blundo and Scaffidi, concern the loading or unloading of containers; the other two, relating to claimants Delavventura and Caputo, involve loading of ordinary cargo into consignees' trucks on the pier.

(1) *Blundo*. Claimant Blundo was employed as a "checker" by the International Terminal Operating Co. (ITO).<sup>4</sup> He was injured while checking cargo being removed from a container at the 19th Street pier in Brooklyn when he walked around a draft containing cargo to mark it, slipped on some ice and fell. He was working on the stringpiece within 30 to 40 feet of the water. The container he was checking had been unloaded a few days before at a different pier and then taken by a truckman over city streets to the 19th Street pier where it was opened by the United States Customs Office and then stripped. The Administrative Law Judge (ALJ) found that the 19th Street pier was not utilized by the employer for the actual loading or unloading of vessels but rather for the storage of commodities and for the "stripping,

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<sup>3</sup> Formerly, if an employee was not expressly excluded, as, e.g., a crew member; his injury occurring upon the navigable waters was compensable under the Act so long as his employer had "any . . . employees . . . employed in maritime employment, in whole or in part . . ." 33 U.S.C. § 902(4) (1970).

<sup>4</sup> A "checker" checks the contents of a container carrying goods for several consignees against the bills of lading or other records.

or stuffing, i.e., loading or unloading of containers." The BRB affirmed his findings as to the employee's status and the situs of the accident and upheld a compensation award under the LHWCA.

(2) *Scaffidi*. Claimant Scaffidi was employed by Pittston Stevedoring Corp. as a "hustler" operator, a kind of trucker who moves containers within a terminal. On March 12, 1973, Scaffidi drove a hustler loaded with containers of cargo from the Columbia Street Pier in Brooklyn, New York, through some ten blocks of public streets to Pier 12. On arriving at Pier 12 he backed the container to a receiving platform on the dock in preparation for loading the container on to the ship. When the container was opened, a large case fell out and injured him. The BRB affirmed the findings of the ALJ on the ground that the operator of a hustler used to transport containers within a terminal is engaged in an essential step in the overall process of loading cargo aboard a vessel, which was maritime employment as contemplated in 33 U.S.C. § 902(3). It found that the fact that the container had been transported over public streets was irrelevant.

(3) *Dellaventura*. Claimant Dellaventura, employed by Pittston Stevedoring Corporation as a "sorter," was injured on June 27, 1973 at Pier 20 of the Pouch Terminal on Staten Island while helping to load a truck, belonging to a consignee, with coffee bags which had been offloaded from the ship "CAMPECHE" on or about February 16, 1973. Dellaventura slipped on some loose coffee beans while inside the truck. At times Dellaventura's responsibilities included going into the holds of ships to assist in sorting and loading or off-loading cargo. The accident occurred about 30 feet from the water's edge on the pier. The record affords no explanation for the consignee's 133-day delay in picking up the bags of coffee beans, but the ALJ found that the pier contained no warehouse facilities. The BRB affirmed his decision on



the grounds set forth in *Arvento v. Hellenic Lines*, BRB No. 74-153, 1 BRBS 174, 1975 A.M.C. 153 (Nov. 12, 1974), which held that "‘until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.’"

(4) *Caputo*. Claimant Caputo was usually employed as "terminal labor" by Pittston Stevedoring Corp. When there was no work available at Pittston, he would take a "shape up" job as a longshoreman wherever it was available and on the day of the accident was working for Northeast Marine Terminal Co., Inc. at their terminal adjoining the water in Brooklyn. He was injured while helping a cargo consignee's truckdriver load boxes of cheese, discharged from a vessel at least five days previously, inside the consignee's truck; the injury occurred while he was rolling a dolly loaded with the cheese on it into the truck. Caputo and the employer stipulated that the work he was doing when injured involved the same risk as would obtain wherever and by whomsoever trucks were loaded or unloaded with dollies. But the ALJ found the stipulation lacked significance "in view of the situs where the injury actually occurred." The ALJ made an award in his favor and the BRB concurred.

### III. Motion to Dismiss Petitions in Dellaventura's Case as Untimely.

Dellaventura and the Director, Office of Workers' Compensation Programs, U.S. Dept of Labor, (OWCP) by his attorney, the Solicitor of Labor, have moved to dismiss the petitions of the employer, Pittston Stevedoring Corp., and its insurance carrier, The Home Insurance Co., as untimely. We grant Dellaventura's motion, there-

by rendering it unnecessary to decide whether the Solicitor of Labor was entitled to make one.<sup>5</sup>

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<sup>5</sup> In the cases of Blundo and Caputo, petitioners named as a respondent the Director, Office of Workers' Compensation Programs in the Department of Labor; the petitions in Dellaventura's and Scaffidi's cases did not. The Director moved to amend the captions in the Dellaventura case, apparently for the primary purpose of enabling him to make the motion to dismiss; he made no similar motion to amend the caption in Scaffidi's case.

The issue whether the BRB should be a respondent in court of appeals review of its awards under 33 U.S.C. § 921(c) was treated in *McCord v. Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975). There the BRB moved to dismiss the petition as to it. Petitioner did not oppose the motion and the court granted it, citing recent unreported decisions of the Ninth Circuit. The court reasoned that there was "sufficient adversity" between the claimant and the employer (or its insurance carrier) "to insure proper litigation without participation by the Board," that requiring the Board to participate "would parallel requiring the District Court to appear and defend its decision upon direct appeal" and that the presence of the second comma in 33 U.S.C. § 921(c) which reads:

A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28.

indicated an intention that the Board should not be a party to the appeal. There were pending motions to substitute the Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), as a respondent which were not before the court of appeals. In the *I.T.O.* case, *supra*, the Board moved to be dismissed as a respondent and to have the Director substituted; the court granted the first branch of the motion but denied the second, 529 F.2d at 1088-89.

With respect, we cannot subscribe to the view that Congress intended to create what to us would seem a novel form of review of federal administrative action in which no one representing the Government would be a party. See F.R.App.P. 15(a) ("In each case the agency should be named respondent."). Prior to the 1972 Amendments judicial review took the form of a suit for an injunction in the district court against the deputy commissioner who made the order (former § 921(b)); in the absence of evidence of Congressional intent we find it hard to believe that, by providing internal review followed by an appeal to a court of appeals, Congress meant to oust the Government from further participation as of

right. Appearance as an *amicus* may not be good enough, since it normally does not allow oral argument and never allows an appeal.

Neither the *McCord* nor the *I.T.O.* court discussed § 921a which provides:

Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

The existence of sufficient adversity between private parties has not been thought to preclude the Government's right to be a party in many other sorts of review of federal administrative action. The second comma, especially in a sentence with an inappropriate first one, seems a slender reed; the "other parties" phrase, means the other parties to the BRB review but does not rule out the BRB's being a party to review in the court of appeals. While Congress did not spell matters out with the same specificity as in 28 U.S.C. § 2348, we think it sufficiently indicated its intention that the BRB and other parties to the proceeding before the BRB should be parties to a review by a court of appeals under 33 U.S.C. § 921(c); if the BRB chooses to leave the defense of its order in a particular case to the prevailing private party, it is free to do so.

The administrative regulations do not specify which branch of the agency should be represented as respondent on appeal. 20 C.F.R. § 801.402 seems to contemplate that the BRB is the proper agency respondent in court of appeals review, since it provides that "except in proceedings in the Supreme Court" the representation of the BRB is provided by the Solicitor of Labor. Moreover, § 921a quoted above seems to contemplate that the BRB be represented in court of appeals review. However, 20 C.F.R. § 801.2(a)(10) defines "party" and "party in interest" to include the "Secretary or his designee . . . ." This would indicate that the Secretary of Labor shall determine what officer represents the agency in the court of appeals. The Government's position has been that the Director, OWCP is the proper respondent. The OWCP is an administrative, not a statutory, creation. See 20 C.F.R. §§ 1.1 et seq., and § 701.203. And the Solicitor of Labor is authorized to appear and participate on behalf of the Director, OWCP as an interested party before the BRB. 20 C.F.R. § 702.333(b). However, in the section assigning to the OWCP the responsibility for administering various programs, including the LHWCA, the OWCP is given administrative authority "except [for] 921 as it applies to the Benefits Review Board . . . ." 20 C.F.R. § 1.2(d).

Trying to make sense out of these regulations, we think that while the Director, OWCP is a proper party before the ALJ or the

The statute, 33 U.S.C. § 921(c), provides that a person adversely affected or aggrieved by a final order of the BRB may obtain review by the court of appeals for the circuit where the injury occurred "by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside." The BRB's order was issued on October 9, 1975, but the petition for review was not filed until February 5, 1976.

Petitioners' basis for resisting the motion is as follows: The BRB's Rules and Regulations, 20 C.F.R. § 802.403 (b), provide that the original of any BRB decision shall be filed with the Clerk of the Board, which was done here, and that "[a] copy of the Board's decision shall be sent by certified mail or served personally on all parties to the appeal and the Director." The rule does not say when this should be done. Apparently no such notice was sent to the employer or the insurance carrier but the attorney who represented both parties before the BRB and in this court acknowledges that he received a copy within the 60-day period and does not deny that he advised his clients.

Like 28 U.S.C. § 2344 and similar provisions in the statutes for the review of orders of other agencies, 33 U.S.C. § 921(c) makes the time for seeking review start to run from the entry of the agency's order, even though the agency is under a duty to give notice. See *Willow Crossing Dairy Farm v. Hardin*, 327 F. Supp. 798 (W.D. Pa. 1970) (where review section of Agricultural Adjustment Act provided for filing of review petition within

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BRB, see cases discussed in 3 *Larson, Workmen's Compensation Laws* § 83.19, at n. 49.1 (1976 ed.), the BRB is the proper agency respondent for review in the court of appeals, although the Solicitor of Labor could be designated to represent it. We deem it best to defer resolution of this question to a case where decision on this point is essential; perhaps in the meanwhile the Department will tidy up its regulations.

20 days of "entry" of judgment, word "entry" is to be interpreted normally and petition filed September 28 to review order of September 2 was not timely and did not vest the court with jurisdiction even though counsel for plaintiff did not receive notice of ruling until September 8). The BRB's regulations count the 60-day period from the date on which the decision is "filed," 20 C.F.R. § 802.410.<sup>6</sup> In the parallel situation of review of judgments of district courts in civil cases Rule 4(a) of the Federal Rules of Appellate Procedure likewise makes the entry of judgment the critical date; F.R.Civ.P. 77(d) directs the clerk to serve notice of the entry of a judgment or order but expressly provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," namely, "upon a showing of excusable neglect."

We see no reason not to read 33 U.S.C. § 921(c) as meaning what it says. Cf. *United States v. Michel*, 282 U.S. 656 (1931); *American Construction Co. v. United States*, 107 F. Supp. 858 (Ct. Cl. 1952), *cert. denied*, 345 U.S. 922 (1953). The policy requiring that appeals be timely taken is so strong that ministerial failures by a

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<sup>6</sup> In the only case construing the statutory provisions for mail notice to the parties of the Deputy Commissioner's decision under the old act, 33 U.S.C. § 919, the Deputy Commissioner's first order was apparently neither filed in his office nor mailed to the parties. The court held, in response to the employer's argument that a second, more generous award was barred by the first award, that the first order "did not take on the dignity of an effective award." *American Mutual Liability Ins. Co. of Boston v. Lowe*, 13 F. Supp. 906, 907 (D.N.J.), *aff'd*, 85 F.2d 625 (3 Cir. 1936). We believe this case to be wholly distinguishable particularly since both opinions rest primarily on the failure to file a *signed* order. 13 F. Supp. at 907 (citing *Howard v. Monahan*, 33 F.2d 220 (S.D. Tex. 1929)).



clerk cannot be allowed to overcome it. The Act, like many other administrative review statutes, does not seem even to encompass the "excusable neglect" escape hatch provided for untimely appeals from the district courts. But even if it should be construed as doing so, this would be a most inappropriate case for granting relief. The clerk made the pardonable error of notifying the attorney rather than the parties, exactly what a clerk of a district court is directed to do, F.R.Civ.P. 5(b) and 77(d), and the attorney offers no explanation for having failed to file the petition within the allotted time.

#### IV. Motion to Dismiss Petition in Scaffidi's Case As Not Presenting a Justiciable Controversy.

In the proceedings up through the decision of the ALJ, the caption of this case named both Pittston and Gulf Insurance Company, its insurance carrier, as respondents; both were represented by the same attorney. After the ALJ's decision the insurance carrier paid the award and chose not to contest it further. Pittston then engaged its present attorney who altered the caption. Apparently the claimant made no point before the BRB that the carrier's payment of the award mooted the case; he does now. Despite the general rule that objections not raised before an administrative body cannot be raised on review, we must consider this one since it goes to our jurisdiction.

We see no basis on which a reversal of the BRB's decision would enable the insurance carrier to recover from Scaffidi a payment the liability for which it chose not to contest, and Pittston, which was invited to file a reply brief on the issue, does not suggest one. Cf. *Federal Insurance Co. v. Detroit Fire & Marine Insurance Co.*, 202 F. 645 (6 Cir.), *cert. denied*, 229 U.S. 620 (1913) (insurer which paid its share of loss and failed to join other subrogated insurers in third party suit held entitled to recover ratable share of damages won). Pittston



claims instead that it is nonetheless a "person adversely affected or aggrieved" by the BRB's order, 33 U.S.C. § 921(c), since the award will adversely affect its experience rating and thus increase its future premiums. Cf. *Travelers Insurance Co. v. Belair*, 284 F. Supp. 168 (D. Mass. 1968).

Pittston's contention that this interest affords it standing immediately encounters *Gange Lumber Co. v. Rowley*, 326 U.S. 295 (1945). The Court there held that the appellant-employer had failed to make a showing of substantial injury to any legally protected interest which would entitle it to question the validity under the due process clause of a state statute retroactively extending the time period in which workmen's compensation awards could be modified. Under the state's system, all awards were paid out of a state insurance fund supported by employer contributions of "premiums." Rejecting the employer's argument that its future premium rates would be adversely affected by the increased award, the Court held that the effect of any one accident was too minimal and its possible injury to the employer too speculative to establish the justiciability of the case.<sup>7</sup>

The *Gange* decision, however, has been severely criticized by Professor Davis. He notes that under the state statutes the employer was permitted to appeal, and characterizes the result as "unique," "the extreme one of denying the employer's standing even though the statute conferred such standing." 3 *Davis, Administrative Law Treatise* § 22.13, n.4 (1958). It may well be that under the more liberal concepts of standing developed in such

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<sup>7</sup> *Gange Lumber Co.* was followed in *Railway Express Agency v. Kennedy*, 189 F.2d 801 (7 Cir.), *cert. denied*, 342 U.S. 830 (1951) (denying employer standing to challenge unemployment compensation payments to striking workers from federal fund). Cf. 2A *Larson, Workmen's Compensation Law* § 77.30 (1976 ed.) (damage action by employer against negligent third party for increased premiums would lie).

cases as *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970), *Gange Lumber Co.* would not be followed. However, even on the standing issue alone, an overruling of *Gange Lumber Co.* would hardly carry the day for Pittston on this record where it has submitted nothing but conclusory assertions of adverse effect on future premiums.<sup>8</sup>

However all this may be, the liberalization of notions as to what makes a person "adversely affected or aggrieved" does not eliminate the requirement that in order for a controversy to be justiciable, the court must be able to afford effective relief. See *Simon v. Eastern Kentucky Welfare Rights Org.*, — U.S. —, 44 U.S.L.W. 4724 (June 1, 1976); *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Local No. 8-6, Oil, Chemical & Atomic Workers Internat'l Union, AFL-CIO v. Missouri*, 361 U.S. 363, 367 (1960); *St. Pierre v. United States*, 319 U.S. 41, 42 (1943); *McKee v. Turner*, 491 F.2d 1106 (9 Cir. 1974). As indicated, Pittston has not claimed that Scaffidi will not retain his award even if we should reverse the BRB; what it is asking is simply an advisory opinion that the award should not have been made.<sup>9</sup> We do not doubt

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<sup>8</sup> There is no proof that payment of this one award would affect the premiums of such a large employer as Pittston. Moreover, we are not told whether the arrangements between Pittston and its insurance carrier allow the latter to take advantage of an award made without Pittston's consent in determining Pittston's ratings and, if so, whether a reversal by us would change matters.

<sup>9</sup> *Jaabeck v. Theodore A. Crane's Sons Co.*, 238 N.Y. 314, 318 (1924), cited by the petitioner in its reply brief, is wholly inapposite. A state workmen's compensation board had entered an award against both the employer and its insurer, one of the questions determined by the board being that of the insurer's liability under the insurance contract. The Appellate Division affirmed the award as to the employer but reversed as to the insurer on the ground that the policy did not cover the risk. The employer appealed to the Court of Appeals, which reversed the Appellate Divi-

that where insurance only partially covers the liability, the employer may appeal from a judgment even though the insurer has paid its part. See *Moore v. Columbia Casualty Co.*, 174 F. Supp. 566 (S.D. Ill. 1959); *Queen Ins. Co. of America v. Meyer Milling Co.*, 43 F.2d 885 (8 Cir. 1930). But where the issue of liability is determined against an insured and its insurer, and the insurer pays the damages in full even without the consent of the insured and chooses not to appeal, the insured cannot appeal from the judgment against him. *Ross v. Stricker*, 153 Ohio St. 153, 91 N.E.2d 18 (1950), discussed in 19 *Couch on Insurance* 2d § 78.228. In short, as the Supreme Court has said, albeit in a different context, once an insurer "has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name." *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-81 (1949); *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C. Cir. 1963). See also *Zauderer v. Continental Casualty Co.*, 140 F.2d 211 (2 Cir. 1944). This seems a reasonable application of the general rule that a party who has no interest in a fund cannot appeal from an order disbursing the fund. *Seaboard Surety Co. v. United States*, 306 F.2d 855 (9 Cir. 1962), and cases cited at 306 F.2d at 859, n.6. We therefore dismiss Pittston's petition.<sup>10</sup>

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sion with respect to the insurer, affirming in full the order of the State Industrial Board. The employer was clearly aggrieved by the order of the Appellate Division and the Court of Appeals gave effective relief by reinstating the order of the State Industrial Board.

<sup>10</sup> An additional reason for this conclusion is that once the insurance carrier has paid, without preserving its right to recover the payment by taking an appeal, the case lacks the necessary quality of adversariness. We see no reason why a person in Scaffidi's position should bother to defend against a petition to review or why the BRB or the Director should spend the Government's resources in such a case, even though that was done here.

## V. Interpretation of the Statute

With these preliminaries out of the way, we can now undertake our main task—the interpretation of the coverage clauses of the 1972 Amendments.

Admitting as they must that the Amendments worked some extension of coverage, petitioners and the National Association of Stevedores (NAS), as *amicus curiae*, would limit this to factual situations generally comparable to those in *Nacirema Operating Co., Inc. v. Johnson*, 396 U.S. 212 (1969). There the Court held that the Act, as it then stood, did not cover longshoremen killed or injured on a pier while attaching cargo from railroad cars to ships' cranes for removal to the ships, although coverage presumably would have existed had they been hurled into the water, *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78 (E.D. Va. 1965), *aff'd*, 398 F.2d 900 (4 Cir. 1968) (*en banc*),<sup>11</sup> or injured on deck while performing part of the same operation, *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). Resting its decision solely on statutory grounds, the Court said that "[t]he

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<sup>11</sup> *Nacirema Operating Co., Inc.*, *supra*, reversed the *en banc* decision of the Fourth Circuit in *Marine Stevedoring Corp.*, *supra*. Four cases were before the court of appeals in the consolidated appeal; in only three cases were petitions for *certiorari* filed and granted. Those three cases involved employees injured on the pier as described above whom the Deputy Commissioner had ruled were *not* covered by the LHWCA. The district courts had affirmed the Deputy Commissioners' denial of awards, and were reversed by the Fourth Circuit. In the fourth case (the title case in the court of appeals), the employee, also on the pier, had been injured while lifting a cable off the stern bollard of a vessel when it suddenly straightened, catapulting him into a river where he drowned. The Deputy Commissioner had found that the employee was covered under the Act, his award was affirmed by the district court and by the court of appeals, and it was not before the Supreme Court in *Nacirema*. Mr. Justice Douglas noted in his dissent that "[i]t is incongruous . . . that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened." 396 U.S. at 225.

invitation to move" the line dividing the coverage of LHWCA "landward must be addressed to Congress, not to this Court," 396 U.S. at 224. Petitioners argue that the BRB's rationale in effect reads the "status" requirement out of the Act by affording coverage to any longshoreman injured on a pier no matter what he is actually doing when injured.

The respondent employees, the International Longshoremen's Association (ILA), as *amicus curiae*, and the Solicitor of Labor (see note 5, *supra*) contend that the extension was much more substantial. Their position is that the process of unloading a vessel continues until the cargo is deposited on the consignee's truck on the pier (or begins, in the case of loading, when the goods are being removed from the delivery truck), and that anyone physically participating in this process is engaged in "maritime employment." We disagree with petitioners, without having to decide whether we would go to the full extent urged by their adversaries.

#### A.

We begin our analysis by remarking on the unsatisfactory state of the records before us, even if we include for this purpose the two petitions which we have dismissed. When cases of this nature began coming to the BRB shortly after the enactment of the Amendments, it should have realized that it was faced with a major task of statutory construction in determining what constitutes "maritime employment" or being a "longshoreman or other person engaged in longshoring operations"—which task could be performed satisfactorily only in the light of an extensive factual background detailing the structure of work on the various piers of this country. The following are illustrative of facts we would like to know but on which these records shed little or no light, even as regards the port of New York, let alone the rest



of the nation. Does one gang normally take cargo off or on the ship while another is responsible for transportation beyond the "point of rest"? Does the same gang always, sometimes, or often perform both jobs? Is all work on the pier normally conducted by a single employer or is there a division between the stevedore and the "terminal operator"? Even if there is only one employer, does he segregate the employees in their work assignments, by having different collective bargaining agreements or otherwise? Are separate charges made for services beyond the "point of rest" and, if so, for what? Does the "point of rest" shift about on the same pier? Just what is the normal practice for stripping and stuffing containers with goods belonging to different owners or destined to different consignees? Is this work normally done on the pier or in warehouses not adjoining navigable waters? What determines the choices? Does the hazardous nature of the employment stop at the point of rest or continue so long as the cargo is on the pier? Do the hazards change in frequency or degree as the longshoreman moves away from the water? The consolidation of several cases presenting different factual situations in a single large proceeding might have enabled the BRB to make meaningful distinctions. Instead of developing such a record and laying down guidelines for the ALJ's, the BRB has handled each case on an individual basis,<sup>12</sup> and without establishing any record support for the interpretive rules announced therein.

If we were sitting as a court of last resort, we would remand these cases to the BRB on our own motion with

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<sup>12</sup> We were told at argument that in the *I.T.O.* case the NAS tendered to the BRB a "Brandeis brief" intended to give the BRB some of the general information we have mentioned, outlining the division of labor in 45 ports in the United States; that the tender was rejected on the objection of the Solicitor on behalf of the Director, OWCP; but that the document was discussed at oral argument in the Fourth Circuit and has been referred to in other decisions of the BRB. We have not had even that much assistance.



directions to cause such a hearing to be held. But with the cases in their present posture in this circuit and others, we think it more helpful for us to state our views on what is now before us.<sup>13</sup>

## B.

Perhaps the most useful way to approach the issue is to begin by discussing certain arguments we have not found to be particularly helpful.

(1) *The "presumption" of coverage, 33 U.S.C. § 920.* The claimants, the Solicitor of Labor, and the ILA place great reliance on a provision in the LHWCA as originally adopted in 1927, 33 U.S.C. § 920, and still in effect, that four things shall be presumed in the absence of substantial evidence to the contrary. One of these is "[t]hat the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). They contend that if the meaning of the new coverage provision, 33 U.S.C. § 903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretive question of general import such as this. See *Crowell v. Benson*, 285 U.S. 22, 64-65 (1932).

Even in cases holding that the accordion-like phrase "arising out of and in the course of employment," 33 U.S.C. § 902(2), could be widely stretched, the Court has done little more than mention the presumption, *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 474 (1947); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361 (1965) (per curiam), resting its decision mainly on the principle with respect to the scope of

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<sup>13</sup> If one or more of the other circuits seized of this problem should order such a remand, we would entertain a petition for rehearing to enable us to do the same.

review discussed below. In *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), the Court did not rely on the presumption at all, even in the face of a strong dissent. The Court's decisions dealing with questions of coverage of the sort presented here will be searched in vain for any mention of the presumption, see, e.g., *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Norton v. Warner Co.*, 321 U.S. 565 (1944); *Calbeck v. Travelers Ins. Co.*, *supra*, 370 U.S. 114 (1962); *Nacirema Operating Co., Inc. v. Johnson*, *supra*, 396 U.S. 224 (1969),<sup>14</sup> although in *Norton* and *Nacirema* coverage was rejected. The cases in this court, *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640, 645-46 (2 Cir.), *cert. denied*, 382 U.S. 835 (1965), and *Overseas African Construction Corp. v. McMullen*, 500 F.2d 1291, 1296 (2 Cir. 1974), likewise treat the presumption as merely an embodiment of the "rule . . . that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Here the question is not whether a line established by Congress is sufficiently elastic to include the claimant; the main issue is whether Congress placed the line at the "point of rest" or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border. See *Davis v. Department of Labor*, 317 U.S. 249 (1942).

(2) "*Deference*" to the BRB. We likewise see no merit in the contention of claimants and the Solicitor of Labor that we are confined in our decision because of the def-

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<sup>14</sup> In *Davis v. Department of Labor*, 317 U.S. 249, 256 (1942), the Court noted that with respect to the largely "factual questions" relating to whether an employee injured within the "twilight zone" of federal jurisdiction established by the Court should be compensated under state or federal law, "presumptive weight" should be given to the findings of the federal or state administrator of the respective program, and relied in part on § 920(a).

erence owed to the BRB. We agree that the standard of review we must apply is that factual findings of the BRB are conclusive if supported by substantial evidence in the record considered as a whole since, as held in *Potenza v. United Terminals, Inc.*, 524 F.2d 1136 (2 Cir. 1975), it is of no moment that 33 U.S.C. § 921(b) (3) while applying this standard to the BRB's review of the ALJ's findings of fact does not expressly extend it to review in the court of appeals. But we are still confronted with the ever troubling question whether the determination at issue, namely, whether the 1972 Amendments should be so interpreted as to include these claimants, is the kind of question which justifies or requires judicial deference.

We think it is time to recognize, in line with Professor Kenneth Culp Davis' brilliant discussion, 4 Administrative Law Treatise §§ 30.01-.09 and the corresponding sections in the 1970 Supplement, that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand.<sup>15</sup> Leading cases supporting the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if

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<sup>15</sup> Our discussion of the Court's ambivalence with respect to deference is not to be read as dealing with two problems quite different from that here presented. One concerns an agency's exercise of power to formulate substantive rules, where the scope is wide, see, e.g., *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232 (1936); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), and the rules once issued, even if only in the form of guidelines, are "entitled to great deference," *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430-36 (1975). The other concerns an agency's construction of its own rules, see, e.g., *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *TSC Industries, Inc. v. Northway, Inc.*, — U.S. —, — n.10 (1976), 44 L.W. 4852, 4855 n.10 (1976).

without rational basis are *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 146 (1939); *Gray v. Powell*, 314 U.S. 402, 411-12 (1941); and *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944). The rationale of these decisions was applied in the three "arising out of and in the course of employment" Supreme Court cases under the LHWCA—*Cardillo, O'Leary and O'Keeffe*, cited above. Indeed, the Court seems to have rejected the findings of the LHWCA's Deputy Commissioners only once since the statute was enacted, *Norton v. Warner Co.*, *supra*, 321 U.S. 565. However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term. Illustrative cases are *Office Employees International Union, Local No. 11, AFL-CIO v. NLRB*, 353 U.S. 313 (1957), and *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 150 (1944). In one of its most recent decisions on the subject, *Morton v. Ruiz*, 415 U.S. 199, 237 (1974), the Court held that "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose"; this very nearly eliminates the "deference" principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference.

There are several other reasons not to rest decision on the "deference" approach in these cases. One is that unlike the F.C.C. in the *Rochester Telephone* case, the Bituminous Coal Division of the Department of the Interior in *Gray v. Powell*, or the NLRB in the *Hearst* case, the BRB is not a policy making but entirely an umpiring agency. When Congress has charged an agency with the duty to make and implement a national policy, it is more likely that Congress intended the agency to have

some flexibility, free from judicial intrusion, in interpreting the Congressional grant. Compare *Rochester Telephone Corp. v. United States*, *supra*, 307 U.S. at 146; Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968). A second factor is the way in which the agency has gone about its job. As suggested above, we would be much more inclined to defer to a considered judgment of the BRB rendered on a full record than to this series of short opinions on isolated facts which contain no in-depth study of the problem. A somewhat related point is that although the BRB's decisions have been "consistent and contemporaneous," the issue arose almost immediately after the 1972 Amendments became effective at a time when the BRB had little experience in the administration of the Act; yet its initial decisions, surely not the result of any great expertise, became the basis for all the others. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Finally, this is a case where understanding of the statute depends in no small measure on prior judicial decisions and legislative history—subjects on which a court has a greater competence than the BRB. We therefore reject the argument that the BRB's decisions in these cases must be affirmed if they are rational but wrong.

(3) *Other definitions.* We likewise give little weight to arguments made on both sides which are based on definitions of "longshoreman" or maritime employment or contracts formulated in different contexts and for different purposes. The ILA relies on Congress' approval, Act of Aug. 12, 1953, ch. 407, 67 Stat. 541, of definitions (reproduced in the margin)<sup>16</sup> in a compact between New

<sup>16</sup> See ILA Amicus brief at 5-6 n.1. The definitions in the Bi-State Compact can be found at § 9806 of McKinney's Unconsolidated New York Laws and § 32:23-6 of N.J.S.A.



York and New Jersey creating the bi-state Waterfront Commission. To assume that the 1972 Congress had in mind this action of its predecessor of 1953 is to attribute a degree of acumen few Congressmen would claim. Beyond that, the purposes of the two enactments were quite different; it is for that reason that paragraph (1) of the Waterfront Commission Act includes persons, notably clerical workers, clearly not embraced under the most liberal construction of the 1972 Amendments.

On the other hand, a narrow definition of "longshoring operations" <sup>17</sup> formulated by the Secretary of Labor in

<sup>16</sup> [Continued]

"Pier" shall include any wharf, pier, dock or quay.

"Other waterfront terminal" shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the Port of New York district and which is used for waterborne freight in whole or substantial part.

"Longshoreman" shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores . . . .

"Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement with a carrier of freight by water, in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals.

<sup>17</sup> \* \* \* the loading, unloading, moving or handling of cargo, ships stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.

25 Fed. Reg. 1566 (1960), 29 C.F.R. 9.3(i).



1960 as part of safety regulations issued in respect of "all employments covered by this chapter," 33 U.S.C. § 941(a), is likewise not dispositive of the meaning of the words used in the Amendments since under the old statute covered employment was limited to injuries occurring "upon the navigable waters of the United States (including [only] any drydock)." And despite the definition of "carriage of goods" as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship" contained in the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1301(e), we have held that the contract of carriage, obviously a maritime contract, persists after unloading and that the carrier remains liable, not as a carrier but as a bailee, until it delivers the cargo to the consignee or places it in a public dock or warehouse. *David Crystal, Inc. v. Cunard Steamship Co.*, 339 F.2d 295, 298 (2 Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 811-12 (2 Cir. 1971); *Cameco, Inc. v. S.S. American Legion Lines*, 514 F.2d 1291, 1295-96 (2 Cir. 1974).

(4) *Liberal construction of remedial legislation.* There is more force in the contention of the claimants and the Solicitor that a broad reading of the 1972 Amendments is required by the oft-iterated principle that remedial legislation should be construed liberally. The Supreme Court said, as to this very statute, although in a quite different context, *Voris v. Eikel*, 346 U.S. 328, 333 (1953):

This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.

Petitioners do not altogether overcome this point by arguing that a statute must be construed with reference to the mischief intended to be overcome, see *Heydon's*

*Case*, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584), and that all that Congress intended to “remedy” was the unjust result of *Nacirema Operating Co. v. Johnson*, *supra*, 396 U.S. 212, by accepting the invitation which, pursuant to Mr. Justice White’s suggestion, the unions extended to it.<sup>18</sup> The statutory language can fairly be read to do more than that and thus the liberality principle tends in favor of such a reading.

## C.

With this background we address ourselves, at long last, to the words of the statute with the aid of the legislative history. There is no question that claimants met the situs test of § 903(a),<sup>19</sup> and concededly all worked

<sup>18</sup> The argument, in fact, flounders on a number of points. The invitation issued in *Nacirema* was broadly phrased:

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen’s Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen’s Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24. The Court contemplated at least two possibilities: an extension of the LHWCA to cover longshoremen injured on a pier “while loading or unloading a ship,” or an extension to “coincide with the limits of admiralty jurisdiction.” In the absence of clarifying legislative history, we would have no idea which set of evils referred to in *Nacirema* Congress was endeavoring to overcome.

<sup>19</sup> In the *Blundo* case the petitioner, I.T.O. makes a halfhearted argument that *Blundo* was not injured on the navigable waters within the expanded definition because the 19th Street pier on which he

for covered "employers" under the Act; the question is whether each—now Blundo and Caputo—was a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ." § 902(3).<sup>29</sup>

If there were any doubt on the face of the statute, the legislative history makes clear that § 902(3), as here relevant, is to be construed no differently than if it said "any longshoreman or other person engaged in longshoring activity or engaged in other maritime employment." Cf. *Argosy Limited v. Hennigan*, 404 F.2d 14, 20 (5 Cir. 1968); *United States v. Gertz*, 249 F.2d 662, 666 (9 Cir. 1957). The Senate Committee on Labor

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was injured was not used for the loading or unloading of vessels. This argument flies in the face of the statute, which reads ". . . including *any* adjoining pier . . . or *other* adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." (Emphasis added.) It would seem that any pier next to the water is included within the situs definition. Accord, *I.T.O. Corp. of Baltimore v. Adkins*, *supra*, 529 F.2d at 1083-84. The testimony before the ALJ established that Blundo was injured at one of two "finger" piers which jutted into the water from the terminal. The entire terminal adjoined the water and was enclosed by a single gate. The finger pier at 21st Street was used for vessels; the finger pier at 19th Street was used to load and unload containers. Blundo was clearly on a "pier" and a "terminal" adjoining the water, a part of which was used for loading and unloading vessels. This is sufficient.

<sup>29</sup> Judge Craven, dissenting from the panel opinion in *I.T.O.*, advanced the argument, although he did not base his conclusion on it, that this phrasing might make the inquiry too narrow, since § 902(3) also includes "any harborworker," 529 F.2d at 1090 n.3. He cited the statement in 1 *Norris, The Law of Maritime Personal Injuries* § 3 (3d ed. 1975), that the longshoreman is only "[f]irst in the catalogue of harbor workers." Arguably, however, Congress intended "harbor workers" to refer only to persons similar to those specifically described ("any harborworker including a ship repairman, shipbuilder, and shipbreaker") and not to persons concerned with the movement of cargo. But see *Norris, supra*, § 5. Like Judge Craven we find it unnecessary to decide the point.

& Public Welfare stated, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., at 13:

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The House Committee Report, No. 92-1441, 92d Cong. 2d Sess. contained identical language.

Secondly, and more important, Congress perceived a need to provide expressly for coverage for "any longshoreman" in addition to what it had established for a person engaged in "longshoring operations."—A "longshoreman" may thus be covered at some times even when he is not engaged in traditional longshoring activity. This alone is sufficient to condemn the "point of rest"



doctrine. Petitioners concede that persons engaged in moving unloaded cargo to its first point of rest or moving cargo to be loaded from its last point of rest are engaged in "longshoring operations." If they alone were to be covered, there was no need to provide also for "any longshoreman."

What then did Congress mean by that phrase? Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards. But see *Weyerhaeuser v. Gilmore*, *supra*, 528 F.2d at 962.

The reports of the Senate and House committees go a long way toward supplying an answer. Immediately after the two paragraphs quoted above came the following:

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of

cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Two conclusions emerge from this with seeming certainty: One is that Congress was concerned about "the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels," new facts of life on the waterfront which, as this court noted in *Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884, 886 (2 Cir. 1970), mean that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds. Congress intended to cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-a-vis a "point of rest." The committees said expressly that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." Congress did not say they were covered only if they "unloaded the container at the stop where a crane had first deposited the container or loaded it at a place on the water's edge; one of the advantages of containers is that they permit loading or unloading to be done at less congested locations. It sufficed for cover-



age if an accident arising from the stripping or stuffing of containers occurs at a place within the situs test. One answer to petitioners' argument that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did. This would decide Blundo's case if he had been "checking" the container at the pier where it was first deposited even if it had been moved several times. We fail to perceive any significant difference because, for the convenience of someone, it had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed.<sup>21</sup>

The second conclusion is that Congress was concerned with providing uniformity of coverage for persons engaged in the loading or unloading functions on the piers. It wished to minimize the occasions when longshoremen and other harbor workers would be walking from the liberalized benefits of LHWCA to the much lower ones provided by state compensation laws.<sup>22</sup> Petitioners argue

<sup>21</sup> As many admiralty cases have decided, in construing other doctrines of maritime law, a realistic view of the loading or unloading process recognizes that it does not stop as soon as the cargo first hits the pier on being removed from a vessel, nor does it begin only when the cargo stands on the pier next to the vessel on which it is about to be loaded. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 214 at n.14 (1971), *rev'g on other grounds Law v. Victory Carriers, Inc.*, 432 F.2d 376 (5 Cir. 1970). Frequently large gangs of longshoremen, dozens of men, are assigned different tasks in a continuous process which moves cargo off a vessel ultimately to a warehouse or storage area at the far end of the pier or terminal. *Garrett v. Gutzeit*, 491 F.2d 228 (4 Cir. 1974).

<sup>22</sup> Joseph Leonard, Safety Director of the ILA, in speaking to the House Committee about the former coverage provisions, asked, "What do we do, cut ourselves in half?" Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972), before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor, 92d Cong., 2d Sess., 297.

that Congress was concerned with providing uniformity only in the *Nacirema* situation, where the same employee engaged in the same unloading or loading operation would have been protected by the federal statute if a draft of cargo hit him while he was on the ship but not if his injury occurred on the pier itself, and point to the fact that the illustration used by the committees was a case where cargo is "unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." But the committees stated their intention more broadly—"to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." The concern for uniformity was not limited to rectifying the disparity between the longshoreman making up the draft on the ship and the longshoreman receiving it on the pier; it extended to the disparity that would result if a line were drawn between the latter and a longshoreman, perhaps the very same one, who moved the unloaded cargo to another place on the pier.<sup>23</sup> The committee's language clearly is broad enough to cover a person like Caputo who spent a significant part of his time in working on vessels, so long as he did not come within the category mentioned as being excluded—employees who are not engaged in loading or unloading a vessel, "[t]hus, employees whose responsibility is only to pick up stored cargo for further trans-shipment."

Petitioner asserts that Caputo came within both descriptions of excluded persons. Clearly he did not come within the second. His responsibility was to perform a variety of jobs on the pier, on both sides of the "point of rest," including going on vessels. Also we would not

<sup>23</sup> Congress also expressed interest in extending federal coverage to as many longshoremen as possible to avoid the "disparity in benefits payable . . . for the same type of injury depending on . . . in which State the accident occurs." Senate Committee Report, *supra*, at 12.

regard the cargo as "stored" within the committees' meaning simply because the consignee had delayed five days in picking it up.<sup>24</sup> The question whether he was engaged in loading or unloading (here unloading) is closer. If his injury had occurred while he was moving the boxes of cheese from a previous position on the pier to the consignee's trucks, he clearly would have been engaged in "unloading," in the way that term is used in ordinary speech. That being so, it would be wholly artificial to draw a distinction because his injury occurred while he was inside the consignee's truck. See note 21, *supra*. To be sure, the carrier would probably have fulfilled its legal duty if it had instructed the stevedores simply to place cargo alongside consignees' trucks and leave the loading of the trucks to them. But, so far as we can gather from this meagre record, that is not the life of the waterfront. The driver needs help in loading or unloading his truck, it would be uneconomical for him to carry a sufficient supply of helpers, everyone wants the truck off the pier as soon as possible, so the stevedores have their employees lend a hand. It is not clear whether an additional charge is collected for this, but we do not think it matters. Neither do we think it matters that the stevedore might not be liable for mishandling by a longshoreman within the truck.

Petitioners make a significant argument that the high benefits under the Amendments were provided because of the extremely hazardous nature of longshoring and that these extraordinary hazards no longer exist once the cargo is beyond the "point of rest." Indeed, in Caputo's case the parties stipulated that what Caputo was doing was the same, and entailed the same risk of injury,

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<sup>24</sup> We thus are not required to decide whether cargo should ever be regarded as "stored" so long as it remains on the pier in the custody of the stevedore employed by the vessel rather than being placed in a public warehouse. Dellaventura's case, where there was a delay of 133 days, might have demanded such a decision.

as exists wherever and by whomsoever trucks are loaded or unloaded with dollies. The Senate Report, p. 2, refers to "high-risk occupations such as those covered by this Act" and says that "[l]ongshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations." What we do not know is what types of operations were considered to be longshoring for the purpose of these calculations. Also, as shown by the case of Blundo, who slipped on ice while he was checking the contents of a container that was being stripped on a pier other than the one where the vessel was unloaded, unusual hazards can exist due to the exposure of piers to the elements which would not exist in a manufacturing plant or in a garage or warehouse where containers removed from trucks were being stripped. Doubtless the hazards of longshoring vary with the particular tasks being performed, and may in some instances be no greater than those encountered by persons doing similar work in places other than piers or terminals adjoining the water's edge.<sup>25</sup> However all this may be, we find nothing in the words of the statute or its legislative history that would enable us to construct a "hazard" test; Congress' intention was rather to provide uniformity of coverage for workers injured while engaged in the process of loading or unloading ships who met the situs test. We note in this connection that the increased benefits inure to shipbuilders meeting the situs test, although much of their work is performed in facilities no more hazardous than those not within the expanded definition of "navigable waters" and that the benefit schedules of LHWCA apply to all industrial accidents in the

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<sup>25</sup> But see the statement of Representative Hicks of Massachusetts on the floor of the House. 118 Cong. Rec. 36387 (Oct. 14, 1972). And see House Hearings, *supra* note 22, at 288-89 (statement of Patrick Tobin, Internat'l Longshoremen's and Warehousemen's Union (ILWU)).



District of Columbia, Act of May 17, 1928, ch. 612, 45 Stat. 600 (1928), 36 D.C. Code § 501 (1973).

In a variation of the argument last considered, petitioners contend that because of the higher benefits payable under LHWCA than under state compensation acts, construing the Amendments to apply beyond the point of rest will increase the already high expenses of stevedores to an extent that Congress could not have intended. Clearly, as explained at the outset, the act was a trade-off—a gain to the stevedores in doing away with the *Sieracki-Ryan* triangle, a gain to the workers in higher benefits and in moving the *Jensen* line shoreward. Just how much added cost Congress meant to impose on stevedores by the second part of the bargain is impossible to determine.<sup>26</sup> What is clear is that Congress had a profound distaste for a regime in which employees engaged in the rough and tumble work described in the Amendments should be covered under the Federal Act at one moment and under state acts at another.

We therefore hold that the Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a sig-

<sup>26</sup> It is worth noting that the increased benefits provided by the Amendments followed recommendations of the National Commission on State Workmen's Compensation Laws (Sen. Rep., p. 4), and that Congress may well have expected that enactment of the Amendments would have an effect on state compensation laws. Hearings on S. 2318, S. 525, and S. 1547 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972) before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., at 74 (statement of James O'Brien, Ass't Dir. Soc'l Sec. Dep't, AFL-CIO), 149 (statement of Joseph Leonard, Safety Director, ILA).

nificant part of his time in the typical longshoring activity of taking cargo on or off a vessel. That is as far as we need to go to affirm Blundo's and Caputo's awards; whether the proviso is essential can be left for another day.

Petitioners say, as indicated above, that in effect our construction reads the status requirement out of the Act. We concede it goes some way in that direction. But it does not do so completely; we part company with Gilmore & Black when they assert that the committee reports should be disregarded and the Amendments then "can fairly be read to cover all employment-related injuries which occur within the Act's territorial limits." The Law of Admiralty, § 6.51 at 430 (1975).<sup>27</sup> We believe our position avoids some of the more problematic possibilities lurking in the new "status" requirement, and accords with the liberal interpretation which must be given this remedial statute and its remedial amendments. See Comment, Broadened Coverage Under the LHWCA, 33 La. L. Rev. 683, 693 (1973).

## VI. Constitutionality

In so construing the Amendments we have necessarily assumed that the construction would be constitutional. We think that assumption is well founded.

It is beyond dispute that "Although containing no express grant of legislative power over the substantive law, the provision [of Article III as to admiralty and maritime jurisdiction] was regarded from the beginning as

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<sup>27</sup> They add that "a female secretary who works in a terminal warehouse should qualify as a LHCA harbor worker in exactly the same way that a female hairdresser in a cruise ship's beauty salon qualifies as a Jones Act seaman." *Id.* We do not find the analogy persuasive. Cruise ships encounter rough weather and may even sink; terminal warehouses don't. Cf. *Malramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2 Cir. 1973).



implicitly investing such power in the United States." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924). The classic definition of the jurisdiction was Mr. Justice Story's in *DeLovio v. Boit*, 7 Fed. Cas. 418, 444, Case No. 3776 (C.C.D. Mass. 1815) that it "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality, the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." Mr. Justice Story used the broad term "locality" in his definition of the jurisdiction with respect to "torts, and injuries." Although the Supreme Court later defined locality as including only injuries suffered on navigable waters and not injuries on the land caused by a vessel, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), the Court has acquiesced in Congress' overruling that holding by the Admiralty Extension Act, 46 U.S.C. § 740, which was applied without question in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). See also *United States v. Matson Navigation Co.*, 201 F.2d 610 (9 Cir. 1953), cited with approval in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209 n.9 (1971), in which the Court stated that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution." *Id.* at 216.<sup>28</sup> Most important of all are the statements in *Nacirema, supra*, 396 U.S. at 223, that "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship," and the suggestion that Congress

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<sup>28</sup> The Court has also sustained the Jones Act, which accords to seamen a remedy for injuries on land as well as on the sea, as an extension of the remedy of maintenance and cure. *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 40-41 (1943). If *Sieracki* retains any vitality, the constitutionality of the extension of coverage by the Amendments could be supported on this theory.

be invited to do something about this, *id.* at 397. The Court would scarcely have suggested this if it had entertained doubt as to the constitutionality of a Congressional response.

We thus see no reason to question the power of Congress to expand the concept of a maritime tort to include injuries suffered by persons on structures adjoining navigable waters in the course of employment related to ships. If we were more doubtful on the point than we are, we would see no reason why the extension of coverage could not be predicated on the portion of the jurisdiction relating to maritime contracts, where there is no "locality" test. Contracts of employment relating to maritime matters are within that jurisdiction, *Sheppard v. Taylor*, 30 U.S. (5 Pet.) 675 (1831), and claims under LHWCA are by an employee engaged in "maritime employment" against an employer.

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The petition to review in Dellaventura's case is dismissed as untimely and the petition in Scaffidi's case is dismissed on the ground that there no longer is a justiciable controversy between the employer and the employee. The petitions in Blundo's and Caputo's cases are denied on the merits.

LUMBARD, Circuit Judge (concurring and dissenting):

I agree that Pittston's petition seeking review of the award in Scaffidi's case should be dismissed as there is no justiciable controversy by reason of the insurance carrier's payment of the award. I also agree that Pittston's petition to review Dellaventura's case should be dismissed as untimely filed.

With respect to the denial of the petitions in the Blundo and Caputo cases, I respectfully dissent. As the relevant

considerations have been so ably and extensively set forth here by Judge Friendly and also by Judge Winter in *I.T.O. of Baltimore v. Benefits Review Board*, U.S. Dep't of Labor and Adkins, 529 F.2d 1080 (4th Cir. 1975), no purpose would be served in any further protracted discussion. I agree with Judge Winter that "[t]he 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in 'maritime employment' was injured on land," 529 F.2d at 1081, and with his additional statement that "... with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions,'" 529 F.2d at 1088.

It is more in keeping with the realities of maritime employment to draw the line at the first point of rest in discharging the cargo and at the last point of rest in loading a vessel. Moreover, such a rule is far easier to apply and avoids claims such as that put forward by Dellaventura that he is entitled to compensation for his injury while loading a consignee's truck with coffee bags which had been stored in a warehouse for 133 days after being removed from the ship *CAMPECHE*. This being so, it seems to me that the interpretation adopted by the Fourth Circuit is more consistent with what the Congress intended and with the language of the 1972 amendment.

Blundo, a checker employed by I.T.O., was injured while checking cargo being removed from a container. The container was located on a stringpiece of the 19th Street pier in Brooklyn, had been unloaded a few days before at a different pier and had been trucked through the streets to the 19th Street pier to be opened there by United States Customs before the container was stripped.

What Blundo did was done well after the container had been left at the first point of rest.

Caputo's principal duties related to terminal labor. When injured he was working at the northeast marine terminal on the Brooklyn waterfront inside the truck of a consignee, while helping the consignee's truck driver load boxes of cheese which had been discharged from a vessel at least five days before. Thus in Caputo's case his activity occurred after the boxes of cheese had come to rest on the pier.

For these reasons I would grant the petition and set aside the awards in the cases of Blundo and Caputo.

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of July, one thousand nine hundred and seventy-six.

Present: HON. J. EDWARD LUMBARD  
HON. HENRY J. FRIENDLY  
HON. JAMES L. OAKES  
*Circuit Judges.*

75-4043, 75-4249  
76-4009, 76-4042

PITTSTON STEVEDORING CORPORATION,  
*Petitioner*

v.

JOHN SCAFFIDI,  
*Respondent.*

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IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER  
THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPEN-  
SATION ACT MADE BY CARMELO BLUNDO,  
*Claimant-Appellee*

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,  
*Self-Insured Employer-Appellant*  
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR,  
*Respondent.*

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44a-2

NORTHEAST MARINE TERMINAL COMPANY, INC.,  
and STATE INSURANCE FUND,  
*Petitioners*

v.

RALPH CAPUTO, and DIRECTOR, OFFICE OF  
WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR,  
*Respondents.*

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PITTSTON STEVEDORING CORPORATION and  
THE HOME INSURANCE COMPANY,  
*Petitioners*

v.

ANTHONY DELLAVENTURA, and DIRECTOR, OFFICE OF  
WORKERS' COMPENSATION PROGRAMS,  
*Respondents.*

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Petitioners for review of orders of the Benefits Review Board of the Department of Labor.

This cause came on to be heard on the administrative record of the Benefits Review Board and was argued by counsel.

Upon consideration thereof, it is now hereby ordered, adjudged and decreed that said petitions be and they hereby are dismissed in part and denied in part in accordance with the opinion of this court with costs to be taxed against the petitioners.

A. DANIEL FUSARO  
Clerk

By /s/ Vincent A. Carlin  
Chief Deputy Clerk

APPENDIX B

BRB No. 75-142

CARMELO BLUNDO

*Claimant-Respondent*

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.

*Employer-Petitioner*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PRO-  
GRAMS, UNITED STATES DEPARTMENT OF LABOR

*Party in Interest*

DECISION

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Appeal from Decision and Order of Patrick G. Geraghty,  
Administrative Law Judge, United States Department  
of Labor.

Leonard J. Linden (Linden and Gallagher), New York,  
New York, for employer.

Angelo C. Gucciardo (Israel, Adler, Ronca and Gucciar-  
do), New York, New York, for claimant.

Ronald Meisburg (William J. Kilberg, Solicitor of La-  
bor, Laurie M. Streeter, Associate Solicitor), Washington,  
D.C., for Director, Office of Workers' Compensation Pro-  
grams, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller,  
Members.

Miller, Member:

This appeal by the employer seeks review and reversal  
of a Decision and Order (75-LHCA-157), and a subse-

quent Order by which the first was amended, of Administrative Law Judge Patrick G. Geraghty. The claimant was awarded compensation for temporary total disability, interest, medical expenses and attorney's fees. The employer was credited with amounts already paid to the claimant pursuant to the compensation statute of the state of New York. The claim was filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

The claimant sustained injuries to his back and head on January 8, 1974, while working as a checker with a crew of men who were stripping a container at the 19th Street Pier, within the employer's terminal at Brooklyn, New York. The containers which were stripped at the time of injury had been off-loaded from a vessel some time previously, apparently by employees of another company, and brought to the I.T.O. Co. terminal by truck for stripping.

The administrative law judge found that the claimant's injury occurred within both the "status" and "situs" jurisdiction of the Act and awarded compensation accordingly. In this appeal, the employer contests these findings, contending that at the time of injury, neither the employer, the employee or the place of injury was within the jurisdiction of the Act and that finding this claim to be within the jurisdiction of the Act is unconstitutional.

The Board rejects the employer's arguments and agrees with the administrative law judge. This injury did occur under circumstances which are within the jurisdictional requirements of Section 2(3), (4) and 3(a) of the Act. 33 U.S.C. §§ 902(3), (4), 903(a).

It is argued that the claimant was not engaged in maritime employment at the time of his injury, and so was not an "employee" within the meaning of Section

2(3), because the container being stripped had been brought to the employer's terminal by a trucking company over public streets and that once delivered to this trucking company, the container was being moved for trans-shipment and had left maritime jurisdiction. The Board has consistently held that stripping containers, which may have been off-loaded from a vessel some days earlier, is a longshoring operation, part of the over-all process of unloading a vessel, is maritime employment and a person engaged in this activity is an "employee" within the meaning of Section 2(3). *Stockman v. John T. Clark & Son of Boston, Inc.*, 2 BRBS 99, BRB No. 74-231 (July 30, 1975). The fact that the claimant was a checker rather than a longshoreman actually engaged in removing cargo from a container does not remove him from the Act's coverage; the legislative history of the Act specifically indicates intent that checkers be covered. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. 92-1441, 92d Cong., 2d Sess. 11 (1972). The fact that the container had been removed from a ship at one location and transported to another location for stripping does not take it out of maritime commerce. See *Stockman, supra*. Cargo remains in maritime commerce until it is delivered to a consignee for further trans-shipment and moving a container from one location to another for the purpose of stripping, removing its contents in preparation for delivery to consignees, is not itself "further trans-shipment" so as to take it out of maritime commerce.

The employer contends that it is not an "employer" within the meaning of Section 2(4) because it was not engaged in unloading a vessel at the 19th street pier at the time of the claimant's injury. Since the claimant and his co-workers were engaged in a longshoring operation, maritime employment, the employer is an "employer" as defined in Section 2(4). *Harris v. Maritime Terminals, Inc.*, 1 BRBS 301, BRB No. 74-178 (Feb. 3, 1975).

The employer's argument that the place of injury, the 19th Street Pier, is not within the jurisdiction of the Act, is without merit. The claimant was injured within the confines of the employer's terminal, adjoining navigable waters. Such a terminal is within the "situs" jurisdiction of the Act. *Lopez v. Atlantic Container Lines, Ltd.*, 2 BRBS 265, BRB No. 75-117 (Sept. 9, 1975). Since the claimant was injured within a terminal customarily used by an employer in loading or unloading vessels, even though at a neighboring pier rather than the specific pier where the claimant was working, the jurisdictional requirement of Section 3(a) is satisfied. See *Harris v. Maritime Terminals, Inc.*, *supra*.

The employer's final argument, that finding this claimant to be covered requires an unconstitutional interpretation of the Act, must be rejected. The Board's views on this subject have been adequately discussed in a prior opinion. *Coppolino v. I.T.O. Co., Inc.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974).

The Decision and Order, as amended, of the administrative law judge, is affirmed in all respects.

Dated this 30th day of October, 1975.

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APPENDIX C

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
Washington, D.C. 20210

Case No. 75-LHCA-157

(Formerly No. 2-31357)

In the Matter of

CARMELO BLUNDO,

*Claimant*

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,  
*Employer (Self-Insured)*

Angelo C. Gucciardo, Esquire  
Israel, Adler, Ronca & Gucciardo  
160 Broadway  
New York, New York 10038

For the Claimant

Leonard J. Linden, Esquire  
Linden & Gallagher  
20 Vesey Street  
New York, New York 10007

For the Employer

Ronald Meisburg, Esquire  
William J. Kilberg, Solicitor of Labor  
Marshall H. Harris, Associate Solicitor of Labor

By Brief

For the Director, Office of  
Workers' Compensation Programs

Party in Interest

Before: PATRICK G. GERAGHTY  
Administrative Law Judge

*Decision and Order*

This is a proceeding held pursuant to the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter cited as the Act), on a claim for compensation benefits filed by Carmelo Blundo (hereinafter referred to as Claimant) under the Act. The case is before this Administrative Law Judge for formal hearing and decision, as is provided by the Act and the Rules and Regulations implementing said Act, 20 C.F.R. § 701 and 702.

After due notice to the Parties, a formal hearing was held, on this matter, on December 11, 1974, in New York City, New York. The Claimant was present and was represented by his Attorney, Angelo C. Gucciardo, Esquire. The Employer, who is Self-Insured, was represented by its Counsel, Leonard J. Linden, Esquire. Counsel were afforded full opportunity to present evidence, to call, examine and cross-examine witnesses.

Counsel from the Office of the Solicitor of Labor was not present at the formal hearing; however, the Solicitor has filed a Brief on behalf of the Director, Office of Workers' Compensation Programs, a Party-in-Interest, pursuant to 20 C.F.R. § 702.333(b). Counsel for the other Parties have also submitted Briefs in support of their respective positions and Counsel for Employer has also submitted a memoranda in reply to the Briefs filed by the Claimant and the Solicitor. In addition, Counsel for Claimant has submitted a petition for allowance and in support of a reasonable attorney's fee. All these documents have been duly considered and they are hereby incorporated into this record.

*Stipulations of the Parties*

At the commencement of this formal hearing, Counsel for the Parties stipulated and agreed that there was no dispute as to the following matters:

1. The Claimant sustained his injury on January 8, 1974, while in the employ of the Employer and within the course of said employment.
2. There was timely notice, both of the injury and of this claim.
3. The Claimant, as a result of said injury was temporarily totally disabled from January 9, 1974, to February 1, 1974, for which period Employer has paid to Claimant \$285.00, as compensation benefits pursuant to the New York State Workmen's Compensation Statute, less two (2) days worked.
4. The Claimant's average weekly wages, at time of injury, were \$257.69, for a compensation rate of \$171.79 per week.
5. The Claimant sustained an accidental injury to his head and lower back, while working as a checker at Employer's pier facility, located at 21st Street, Brooklyn, New York.

These stipuations and agreements are accepted and these matters are, therefore, considered established.

*Issues*

There are two questions presented for resolution: (1) Did the Claimant sustain his injury in an area within the jurisdiction of the Act; (2) Was the Claimant, at the time of injury, an "employee" within the meaning of the Act?

*Decision*

It is argued that the Claimant is not entitled to compensation benefits under the Act, as he did not sustain his injury in a place within the jurisdiction of the Act.

In the 1972 Amendments to the Act, Congress expanded the situs test<sup>1</sup> by providing that:

Compensation shall be payable under the Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.*) (Emphasis added).<sup>2</sup>

Thus, Congress has modified the original situs requirement, expanding the physical locus of the Act's jurisdiction to include injuries incurred on shoreside facilities.

The Claimant, on the date of his accident, was employed at Employer's facility, commonly known as 21st Street Pier, which is located in Brooklyn, New York. This enclosed facility encompasses an area 1,000 feet by 700 feet, between 19th and 21st Streets. As reflected in this record, there are apparently two (2) finger-piers at the facility, termed respectively: the 19th Street Pier and the 21st Street Pier. The pier at 21st Street can berth approximately five (5) ships, for purposes of loading or unloading. The 19th Street Pier, however, is not

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<sup>1</sup> Prior to the 1972 Amendments, situs requirements restricted coverage to injuries occurring on the navigable waters of the United States. 33 U.S.C. § 903(a), 44 Stat. 1426 (1927); *Travelers Ins. Co. v. Shea*, 382 F.2d 344 (5th Cir. 1967), *cert. denied*, 389 U.S. 1050 (1967), *reh. denied*, 393 U.S. 903 (1968); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 90 S.Ct. 347 (1969), *reh. denied*, 397 U.S. 929 (1970).

<sup>2</sup> 33 U.S.C. § 903(a), 86 Stat. 1251 (1972).

utilized by Employer for the actual loading or unloading of vessels; rather, it is used for storage of commodities and for stripping, or stuffing, i.e., loading or unloading, of containers. The Claimant sustained his injury at the 19th Street Pier, while checking cargo being stripped from a container, which, sometime previously, had been off-loaded from a vessel at another of Employer's facilities and brought to the 21st Pier facility for stripping.<sup>3</sup>

The legislative history of the Amendment specifically states the Congressional intent to expand coverage beyond the water's edge.<sup>4</sup> The Amendment incorporates this intent, expressly extending coverage to include an adjoining pier, or other adjoining area customarily used by an employer for, *inter alia*, loading or unloading vessels. It has been held that, ". . . until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment such cargo is in maritime commerce . . ." <sup>5</sup> Clearly the container which contains the cargo must, until stripped, also be deemed to be in maritime commerce. Moreover, a construction of the words loading or unloading a vessel, so as to restrict coverage only to those individuals actually engaged in such activity, is unduly restrictive and has been rejected.<sup>6</sup> Such rationale is applicable here and is consistent with cases holding that stuffing or stripping of containers is an in-

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<sup>3</sup> The fact that this work was being done by Employer, under contract, for American Export Lines, does not affect the maritime nature of the work accomplished in this area.

<sup>4</sup> S. Rep. No. 92-1125, 92nd Cong., 2d Sess., 13, *Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972* (1972), at 64; 75.

<sup>5</sup> *Avvento v. Hellenic Lines, Ltd., et al.*, BRB No. 74-153 (November 12, 1974) at 4.

<sup>6</sup> Cf. *Coppolino v. International Terminal Operating Co., Inc.*, BRB No. 74-136 (December 2, 1974) at 3; *Adkins v. I.T.O. Corporation of Baltimore*, BRB No. 74-123 (November 29, 1974).



tegral and essential step in the overall loading or unloading process.<sup>7</sup> I conclude, therefore, that the area in which Claimant sustained his injury is included within the expanded situs requirements of the Act. Accordingly, I find that from the standpoint of situs, this claim comes within the provisions of the Act.

However, employees not engaged in maritime employment as defined by the Act, are not covered just because they sustain an injury in an area to which the Act's jurisdiction has been extended;<sup>8</sup> therefore, if Claimant is to prevail, he must also meet the status tests now imposed by the Act: he must, at the time of injury have been an "employee", in the employment of an "employer", as those terms are defined by the Act. The Employer herein conceded that it is an "employer", as that term is defined by the Act;<sup>9</sup> therefore, it is taken as established that the Employer is an "employer" within the meaning of the Act.<sup>10</sup> The Act contains the following definition of the term, "employee":

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker . . . .<sup>11</sup>

At the time he sustained his injury, the Claimant was performing his duties as a checker, on the 19th Street Pier, assisting in the stripping of a container and the segregation of its cargo into separate drafts. Although

<sup>7</sup> E.g. *Powell v. Cargill, Inc.*, 74-LHCA-172 (October 8, 1974), Judge Miller; *Stockman v. John T. Clark & Son of Boston, Inc., et al.*, 74-LHCA-219 (November 25, 1974), Judge Oliver.

<sup>8</sup> *Legislative History, supra*, note 4 at 75.

<sup>9</sup> TR 80-81.

<sup>10</sup> 33 U.S.C. § 902(4), 86 Stat. 1251 (1972).

<sup>11</sup> 33 U.S.C. § 902(3), 86 Stat. 1251 (1972).

a precise date was not determined, it is clear that the container from which the cargo Claimant was checking was being stripped, was sometime previously off-loaded from a vessel at another of the Employer's facilities and subsequently transported by an independent trucking firm to the 19th Street Pier for stripping and further trans-shipment. The Claimant, while in the process of checking individual drafts formed from cargo stripped from this container slipped on some ice, fell and sustained the injury for which he seeks compensation in this proceeding.

The process of unloading a vessel cannot reasonably be held to have terminated at the point where the cargo and its container hits the pier.<sup>12</sup> Adopting such view, the Benefits Review Board has held that cargo is deemed to be in maritime commerce until it has been delivered for further trans-shipment and that all employees engaged in its movement to that point are engaged in maritime employment.<sup>13</sup> The fact that this particular container had been off-loaded from a vessel at another of Employer's facilities and thereafter trucked to the 19th Street Pier for stripping, i.e., unloading, does not adversely affect Claimant's status. The container was not being trucked for further trans-shipment; rather, it was merely being transported for purposes of unloading. Herein the container had to be stripped and the cargo separated into individual drafts for further trans-shipment; hence both the container and the cargo it contained, must be held to have been moving in the stream of maritime commerce. Until the contents had been stripped, the unloading process had not been completed.<sup>14</sup> I conclude, therefore, that

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<sup>12</sup> Cf. *Di Somma v. John W. McGrath Corp.*, 74-LHCA-176, Judge Miller.

<sup>13</sup> *Avvento*, *supra*, note 5 at 4.

<sup>14</sup> Cf. *Crampton v. Cargill, Inc.*, 74-LHCA-215, Judge Smith; *Stockman v. John T. Clark & Son of Boston, Inc., et al.*, 74-LHCA-219, Judge Oliver.

the stripping of this container and the checking of the drafts was an integral, essential and sequential part of the overall process of unloading cargo from a vessel. Moreover, the Claimant, while engaged in checking this cargo, was performing a function to which Congress expressly extended the coverage of the amended Act.<sup>15</sup>

Upon consideration of the record in its entirety and the applicable precedents, I hold that the Claimant at the time of his injury, was an "employee" of the Employer, as that term is defined by the Act. Accordingly, as the Claimant meets both the situs and the status requirements of the Act, he is entitled to receive compensation benefits pursuant to the Act.

The record indicates that the Claimant has received compensation benefits under the New York State Workmen's Compensation Statute. Acceptance of such benefits under a state act does not constitute an election which precludes recovery under the Federal Act.<sup>16</sup> The Employer, however, is entitled to credit for the amounts paid thereunder against sums due pursuant to the Federal Act.<sup>17</sup>

Counsel for Claimant has filed an application seeking an award of attorney's fees in the sum of \$2,800.00. Upon consideration of the application, my observations during trial and the compensation results obtained, I find that an attorney's fee in the amount of \$1,200.00 would be a reasonable attorney's fee.<sup>18</sup> An attorney's fee for said amount is approved and assessed against the Employer.<sup>19</sup>

<sup>15</sup> *Legislative History, supra*, note 4 at 75.

<sup>16</sup> *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 131, 82 S. Ct. 1196, 1206 (1962).

<sup>17</sup> *Western Boat Bldg. Co. v. O'Leary*, 198 F.2d 409, 411, 412 (9th Cir. 1952).

<sup>18</sup> *Avvento, supra*, note 5 at 5.

<sup>19</sup> 33 U.S.C. § 928(a).

I hold that the disbursements which Counsel for Claimant seeks to recover are not recoverable costs within the meaning of the Act; therefore, their recovery and assessment against the Employer is denied.<sup>20</sup>

*Findings of Fact and Conclusions of Law*

Upon consideration of the record in its entirety, the Stipulations of Counsel, and from observation of the witnesses and their demeanor, I make the following specific Findings of Fact and Conclusions of Law:

1. The Claimant has made a claim for compensation benefits under the Act for injuries he sustained on January 8, 1974, while in the employ of the Employer.
2. The Claimant's injury arose out of and in the course of his employment.
3. The Employer is an "employer" within the meaning of the Act.
4. There was timely notice, both of the injury and of the claim.
5. The area in which Claimant sustained his injury is an area to which coverage has been extended by the Act.
6. At the time of injury, the Claimant was an "employee" of the Employer within the meaning of the Act; therefore, Claimant is entitled to receive applicable compensation benefits under the Act, as the Parties are subject to the Act.
7. The Claimant was, as a result of his injury, temporarily totally disabled from January 9, 1974, to February 1, 1974, for which period, less two (2) days worked he is entitled to the benefits provided by the Act. 33 U.S.C. § 908(b).

<sup>20</sup> 33 U.S.C. § 928(d); *Fox v. Pacific Ship Repair, Inc., et al.*, 75-LHCA-53, at 10-11; *Spencer v. Stockton Stevedore & Warehouse, et al.*, 75-LHCA-52, at 9-10.

8. The Claimant is entitled to have the Employer pay for, or reimburse him for the reasonable cost of such necessary medical treatment and care as the nature of his injury may, or may have required. 33 U.S.C. § 907 (a).

9. The Claimant's average weekly wages, at time of injury, were \$257.69, for a compensation rate of \$171.79 per week.

10. The Employer has paid, to the Claimant, as compensation benefits pursuant to state compensation law the sum of \$285.00, and Employer is entitled to receive credit herein for such sum against amounts due under the Act.

11. The Claimant is entitled to have reasonable attorney's fees assessed against the Employer; however, other disbursements are not recoverable costs, assessable against the Employer.

### *Order*

1. The Employer shall pay to the Claimant compensation for temporary total disability, at the rate of \$171.79 per week, for the period from January 9, 1974, to February 1, 1974, less two (2) days worked.

2. Interest on accrued payments due Claimant shall be paid at the rate of six (6) percent per annum, computed from the date each such payment was due, and the total amount of such payments, as are now due and owing, shall be paid forthwith, in a lump sum, to the Claimant. *Humble Oil and Refining Co. v. Taliaferro*, BRB No. 107-73 (June 1, 1973).

3. The Employer shall be allowed credit in the sum of \$285.00, against such amounts as are due hereunder, which sum is the amount previously paid to the Claimant pursuant to the compensation statute of the State of New York.



4. The Employer shall pay for, or reimburse the Claimant for the reasonable cost of such necessary medical care and treatment as the nature of Claimant's injury has or may require.

5. A legal fee in the amount of \$1,200.00, for legal services rendered to the Claimant is approved in favor of Angelo C. Gucciardo, Esq., which fee shall be paid directly to him by the Employer.

/s/ Patrick G. Geraghty  
PATRICK G. GERAGHTY  
Administrative Law Judge

Dated: March 3, 1975  
Washington, D. C.

APPENDIX D

U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
Washington, D.C. 20210

Case No. 75-LHCA-157  
(Formerly No. 2-31357)

In the Matter of

CARMELO BLUNDO,

*Claimant*

v.

INTERNATIONAL TERMINAL OPERATING CO., INC.  
*Employer (Self-Insured)*

*Order Amending Previously  
Issued Decision and Order*

On March 3, 1975, this Administrative Law Judge issued his Decision and Order in this proceeding, awarding compensation benefits to the Claimant. Therein, the Employer was ordered, *inter alia*, to pay to the Claimant compensation for temporary total disability, at the rate of \$171.79 per week, for the period from January 9, 1974 to February 1, 1974, less two (2) days worked.

Counsel for Claimant has filed a Motion to Modify the Decision and Order of March 3, 1975, on the grounds that the period of temporary total disability set forth in paragraph 1 of said Order is incorrect. Counsel points out that, although under the New York State compensation statute a claim was made and paid for temporary total disability from January 9, 1974 to February 1, 1974, the Parties herein stipulated and agreed that, for purposes of Claimant's claim pursuant to the Federal

Act, Claimant's period of temporary total disability was January 9, 1974 to April 15, 1974, inclusive, less two (2) days worked (TR 6, 11, 9-18; *Joint Exhs.* 1, 2). Counsel for the Employer has not filed a Reply in opposition to this Motion for Modification.

WHEREFORE, as upon consideration of the foregoing promises it appears that the Decision and Order of March 3, 1975, should be modified to conform to the stipulations and agreements of the Parties, it is therefore,

ORDERED, that the Decision and Order of March 3, 1975, be, and the same hereby is, modified as follows:

A. Paragraph 7, *Findings of Fact and Conclusions of Law*:

7. The Claimant was, as a result of his injury, temporarily totally disabled from January 9, 1974, to April 15, 1974, for which period, less two (2) days worked, he is entitled to the benefits provided by the Act. 33 U.S.C. § 908(b).

B. Paragraph 1, *ORDER*:

1. The Employer shall pay to the Claimant compensation for temporary total disability, at the rate of \$171.79 per week, for the period from January 9, 1974, to April 15, 1974, inclusive, less two (2) days worked.

and further, that in all other respects the Decision and Order of March 3, 1975, is affirmed and adopted.

/s/ Patrick G. Geraghty  
PATRICK G. GERAGHTY  
Administrative Law Judge

Dated: April 18, 1975  
Washington, D.C.

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APPENDIX E

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

No. 75-1360

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JOHN A. STOCKMAN,  
*Claimant, Respondent,*

v.

JOHN T. CLARK & SON OF BOSTON, INC.,

and

AMERICAN MUTUAL LIABILITY INC. CO.,  
*Employer/Carrier, Petitioners,*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR,  
*Party in Interest.*

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ON PETITION FROM THE  
BENEFITS REVIEW BOARD

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Before COFFIN, *Chief Judge,*  
McENTEE and CAMPBELL, *Circuit Judges.*

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*George O. Driscoll for appellants.*

*Joseph P. Flannery*, with whom *Joseph G. Abromovitz* and *Kaplan, Latti and Flannery* were on brief, for John A. Stockman, appellee.

*Linda L. Carroll*, Attorney, United States Department of Labor, with whom *William J. Kilberg*, Solicitor of Labor, and *Laurie M. Streeter*, Associate Solicitor, were on brief, for Director, Office of Workers' Compensation Programs, appellee.

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July 27, 1976

CAMPBELL, *Circuit Judge*. This petition for review, brought by an employer and its compensation carrier, raises a difficult question of interpreting the 1972 amendments to the Longshoremen's and Harborworkers' Compensation Act (the Act). 33 U.S.C. § 901 et seq.

Working on the Boston waterfront for his employer, John T. Clark & Son of Boston, Inc. (Clark), John A. Stockman sustained an inguinal hernia on October 1, 1973, while removing the contents of a container<sup>1</sup> which had previously been off-loaded from a vessel. Clark and its insurer, acknowledging liability under Massachusetts workmen's compensation law, furnished Stockman with medical care and paid him compensation at the maximum weekly state rate of \$80 during the seven weeks that he was disabled. Stockman claimed, however, that he was entitled to be compensated at the much higher rate provided in the Longshoremen's and Harborworkers' Compensation Act. Total benefits payable under the Act for the period of disability in question exceeded those payable under Massachusetts law by more than \$700. When Clark and its carrier refused to acknowledge that

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<sup>1</sup> Containers are rectangular metal structures used to transport cargo. After being taken off the vessel by crane, they are provided with a chassis and wheels and converted into large box trailers capable of being trailed on the highways by tractors.



Stockman was covered by the Act, the matter was referred to an Administrative Law Judge, § 919, who ruled after hearing that Stockman was covered. Clark and the carrier appealed from this ruling to the Benefits Review Board (the Board), § 921(b) (1976 Supp.), which affirmed the decision of the Administrative Law Judge. Thereafter they brought this petition, § 921(c) (1976 Supp.).

# I

The difficulty in determining Stockman's coverage arises from the essential ambiguity of the 1972 amendments insofar as they describe, or fail to describe, the employees for whom coverage is afforded. As was developed at the hearing before the Administrative Law Judge, Stockman was a regular employee of Clark who had for three years prior to his injury worked at Berth 5 of the Boston Army Base, an area adjacent to Boston Harbor. Clark is both a stevedore, i.e. a firm engaging directly in the unloading of vessels, and a terminal operator.<sup>2</sup> Clark's Boston Army Base facility was used

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<sup>2</sup> Mr. Kelley, Clark's Treasurer, gave his view of the difference between a stevedoring and a terminal operation as follows:

"The distinction in the point of rest. Cargo that is—whether it be containers or freight bulk cargo—when the longshore gangs are working the cargo and discharging it and they bring that cargo to a point of rest, either in a shed or outside a shed, and they terminate, they finish their job, that's the end of the stevedoring function, and from that point on the terminal operation function takes over, it's somewhat similar to a warehousing operation."

Under Kelley's theory, once the stevedoring function ended, the work became freight handling.

Stockman, on the other hand, insisted,

"Cargo is merchandise that's carried in a vessel and I maintain that cargo does not become freight until after it's grounded on the dock [viz. trucking dock] and the truck driver comes in and touches it. ILA [the International Longshoremen's Association, of which Stockman was a member] helps handle it all the way until it's actually taken out of that container. The container in my opinion is more or less part of the ship."

both to unload vessels that berthed there, and to store and warehouse cargo which had either been unloaded there or been brought in containers from vessels berthed elsewhere.

At the time Stockman sustained a hernia, he was at Berth 5 of the Boston Army Base "stripping" (removing cargo from) a container. The container had been discharged from a vessel that had berthed during the previous three days at Berth 17, Castle Island, a facility located approximately two miles by land or 700-800 feet across water from the Boston Army Base. Under the terms of its contract with Sea-Land Corporation, the owner of the container, Clark was "to unload vessels as they come into port [and] discharge the containers." However, Sea-Land's container vessels did not dock at the Army Base since they require a special crane and berth not available there. Sea-Land's vessels berthed instead at Castle Island, where the containers were put ashore; chassis with wheels were provided; and those containers having full loads for a particular consignee were hitched to a truck-tractor and hauled directly to their ultimate destinations, to be unloaded by the consignee. Some containers would not, however, contain a full load for one consignee and it was up to Clark to strip them, separate their contents by orders, and hold the goods for pickup by consignees. In such cases, as there were no facilities at Castle Island either for stripping or for "stuffing" (placing cargo in) containers, the containers would first be hauled by an independent trucking firm, engaged by Sea-Land, to Clark's Boston Army Base facility. There Clark would remove the contents from the containers, place them on pallets, and hold them for pick-up by truckers for the various consignees. The container Stockman was stripping had been hauled overland from Castle Island by a truck furnished by the

Boston-Taunton Transportation Company under contract with Sea-Land; and Stockman was removing the contents and placing them on pallets at Berth 5 of the Boston Army Base when he sustained his injury.

At the hearing various descriptions were offered of Stockman's job-title. Mr. Kelley, Clark's treasurer, called Stockman a "freight handler" as "that's the insurance code classification that he would fall under". Stockman himself testified that he was classified as a crane operator and for casual work on the dock. He said he drove chisels, stuffed and stripped containers, and shifted cargo. The parties stipulated that Stockman was "employed as a longshoreman with collateral ratings as a cooper and extra dock laborer". Stockman was a member of the International Longshoremen's Association, AFL-CIO, and Clark a member of the Boston Shipping Association, Inc. Under an agreement between the ILA and the Shipping Association, containers within 50 miles of a port (other than ones handled by the "beneficial owners" of the cargo) had to be stuffed and stripped by ILA longshore labor working on a "waterfront facility, pier or dock."

The relevant provisions of the Act against which Stockman's claim of coverage must be measured are §§ 902 (3), 902(4) and 903(a), all as amended in 1972. Section 903(a), entitled "coverage", is sometimes referred to as the "situs" requirement, and provides as follows:

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."

Section 902(3), sometimes referred to as the principal "status" requirement, defines and limits the term "employee" to,

"any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker [exclusive of a master or member of a crew of any vessel, or any person engaged to load, unload or repair any small vessel under eighteen tons net]."

There is also the following definition of "employer" in § 902(4),

"an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The Administrative Law Judge, whose reasoning the Benefits Review Board affirmed, ruled that Stockman's injury occurred at a location within the situs requirements of § 903(a). He found that Stockman was employed to unload containers at Berth 5 of the Boston Army Base; that Berth 5 adjoins navigable waters "and is used for the general cargo operations of loading and unloading vessels, although the stripping of containers received from Berth 17, Castle Island is considered a terminal operation"; and that Stockman's injury met the Act's situs requirements since wharf and terminal areas are specifically mentioned in § 903(a). The Administrative Law Judge attached no weight to the fact that the container had not been discharged from a vessel at Berth 5 of the Boston Army Base but had been driven two miles overland from Castle Island, Berth 5 being,

in any event, a "terminal adjoining navigable waters". And even were this not so, Clark's Army Base facilities were an "other adjoining area customarily used by an employer in . . . unloading . . . a vessel," since any and all Sea-Land containers that were to be stripped were customarily trucked there from Castle Island as an integral step in the process of unloading a vessel.

The Administrative Law Judge went on to rule that Clark, being both a stevedore and terminal operator, was an "employer" within § 902(4) since it employed longshoremen to perform some of this work.

Finally, the Judge held that Stockman met the status definition of "employee" under § 902(3), being engaged in "maritime employment". The Judge thought that little attention should be paid labels such as longshoreman or "freight handler". Stating that it was not the label given but "the nature of the work being performed" that was determinative, the Judge held that "[u]ntil the contents were removed from the containers the unloading procedure had not been completely executed. The unloading of this container was an integral and sequential part of the process of unloading cargo from a vessel. Cf. *Powell v. Cargill, Inc.*, [74-LHCA-172 (October 8, 1974)]; *Richardson v. Great Lakes Storage & Contracting Co., et al.*, 74-LHCA-223 (October 18, 1974)". The Judge continued,

"The fact that the containers had to be trucked two miles across the channel for unloading is not significant. The containers, at this point, were not being picked up from storage for further transshipment, but were merely being transported for unloading. If the containers had been stripped by longshoremen at the Castle Island facility where they arrived, this work activity would, in my view, have been clearly covered by the Act. Claimant should not be denied the protection and coverage



of the Act merely because circumstances required his Employer to have longshoremen perform the stripping function at another waterfront facility two miles away. *Cf. Crampton v. Cargill, Incorporated*, 74-LHCA-215 . . . . Such a finding would not be within the "humanitarian goals" of the Act.

. . . I hold that the Claimant was injured in a shoreside area while he and his Employer were engaged in maritime employment within the coverage of the Act."

In affirming, the Benefits Review Board held it to be "now well settled" that a claimant like Stockman was within the jurisdictional reach of the Act. It said that stripping and stuffing containers were "maritime employment", and that the temporary resting of containers for three days prior to stripping was immaterial to the maritime nature of the employment.

### III

While the Board's determination is consistent with its other recent rulings finding coverage for most handlers of ship's cargo at piers and waterfront terminals, whatever their precise function, judicial decisions to date construing the 1972 amendments reflect a sharp difference of opinion over the reach of the Act. A divided panel of the fourth circuit has ruled that terminal employees, as distinct from those immediately engaged in taking cargo from (or putting it on) a vessel lying at its berth, are not covered even when injured in an area more immediately adjacent to the ship's berth than was the Boston Army Base here. Terminal employees are not, in its view, engaged in maritime employment within the meaning of § 902(3). *I.T.O. Corp. v. Benefits Review Board*, 529 F.2d 1080 (1975), reargued en banc May 4, 1976. The court felt that while the 1972 amendments enlarged the "situs" so as to provide compensation for injuries oc-

curing at designated shoreside facilities as well as on shipboard, they narrowed the "status" requirement so as to limit coverage to only maritime workers engaged most directly in traditional employment, e.g., in cases of longshoremen, those immediately engaged, at the time of injury, in the direct loading or unloading of a vessel itself. To give effect to its interpretation of the amendments, the fourth circuit read into the Act the notion of "point of rest", a point shoreward of which the handling of cargo would cease to be covered by the Act.

A divided second circuit panel has rejected altogether the fourth circuit's point of rest approach. *Pittston Stevedoring Corp. v. Dellaventura*, Nos. 76-4042, -4009, -4043-4249 (July 1, 1976) (Friendly, J.) In *Pittston*, one of the employees was a "checker" who, like Stockman, was stripping a container of goods destined to different consignees at a waterfront area remote from where the ship had been unloaded. The court held that stripping was the "functional equivalent" of sorting cargo discharged from a ship, and was covered by the Act.

From the present judicial melange<sup>3</sup> can be gathered the truth of Judge Friendly's remark:

"Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said." Slip op. at 4683.

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<sup>3</sup> The ninth circuit has also recently interpreted the coverage provisions of the Act, though on facts so different (longshoremen were not involved) as to make the decision of little relevance here. *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3645 (U.S. May 6, 1976) (No. 75-1620). The court emphasized that for an employee to be eligible, his own work and employment must have a "realistically significant relationship" to traditional maritime activity.

## IV

Before expressing our views on the merits, we turn to several preliminaries. First, we consider whether in deciding the scope and coverage of the Act, we should give weight to the presumption stated in § 920 that "the claim comes within the provisions of this chapter". We think not. This provision relieves an injured employee from a perhaps bothersome burden in cases where coverage is uncontested, and it may well denote a policy favoring coverage in close cases; but we do not think it bears on the decision before us calling for a general construction of "whether Congress placed the line at the 'point of rest' or much further landward". *Pittston, supra*, at 4703-04. This basic interpretative decision must precede any application of the presumption.

Second, we do not see the decision before us as one where we owe a special deference to the decision of the Board (and of the Administrative Law Judge, whose views were seemingly carried forward in the Board's shorter opinion). Judge Craven, dissenting in *I.T.O., supra*, 529 F.2d at 1091, quoted the Supreme Court in *NLRB v. Boeing*, 412 U.S. 67, 75 (1973), to the effect that "[a] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts." Under § 939 the Secretary is directed to administer the Act and to make necessary rules and regulations, and under § 921 (1976 Supp.) the Benefits Review Board, with members appointed by the Secretary, is charged with determining appeals subject to review by courts of appeal. Judge Craven concluded that the Board, in "an unbroken line of decisions", has consistently and reasonably interpreted the coverage provisions found in the 1972 amendments, and that this interpretation should be accorded "'great weight'" by a court. 529 F.2d at 1092.

But while the Board's views are obviously to be regarded with interest and respect, we do not think we are justified in a case of this character in subordinating our own judgment. Professor Davis' discussion is particularly helpful in considering how much deference a court ought to accord to agency determinations. 4 Davis, *Administrative Law Treatise* § 30.09 et seq. He suggests three criteria: (1) the relative expertise of agency and court; (2) whether there is express statutory delegation of a question to the agency; and (3) whether the problem involves general propositions or the application of such propositions to specific facts.

The first criterion, the expertise of the court relative to that of the agency, depends in turn upon the nature of the question to be decided. Here the Secretary of Labor and the Board may know more about the technical aspects of work on the waterfront, the needs of workers, and the labor management issues intertwined with the Act, but they have no greater expertise than a court in construing statutes, judicial decisions and legislative history, and the latter is the paramount task before us.

The second criterion is the extent to which Congress may have expressly entrusted the question to the agency rather than to a court. Here Congress entrusted to the Secretary the daily administration of the Act, but created an independent Benefits Review Board to determine appeals "raising a substantial question of law or fact" from initial orders, § 921(b)(3) (1976 Supp.), with ultimate review in the courts of appeal. From this structure, we can doubtless infer an intention to grant to the Board, subject to court review, a substantial oversight of questions of law and policy affecting the distribution of benefits in a particular case. Still, we agree with Judge Friendly that the Board is less a policy-making and more an "umpiring" body than is true of agencies such as the National Labor Relations Board, *see Pittston, supra*, at

4706, while the Secretary's own discretion, being subordinate in the legal area to that of the Board, is even more limited. In sum, while on occasion we may well expect to defer to the Secretary or the Board in particular applications, we see neither the Board nor the Secretary as having been commissioned to settle the sort of question, involving the general construction of an act of Congress, encountered here.

As Davis points out in presenting his third and final criterion, a distinction exists "between enunciation of general propositions or methods of approach and the mere application of such propositions or methods to unique facts." § 30.11, at 253. A question such as whether the Act is to be interpreted to cover all workers in the loading or unloading process, defined broadly, or only those immediately associated with taking the cargo on or off a certain vessel, is the kind of "general proposition" on which courts must provide their own judgment. *Id.* at 254.

This is not to overlook our duty to accept the Board's factual findings when supported by substantial evidence. *Pittston, supra*, at 4704. Although not expressly stated in the Act, compare § 921(b)(3) (requiring the Board to accept the supported findings of the Administrative Law Judge), we readily assume the existence of such a duty. Still the material facts are not in dispute, and as the focus is upon the meaning of the statute, the judgment must be our own, not the Board's.

## V

Proceeding, then, to our own assessment of Stockman's status under the current Act, it is useful first to consider the prior law and the changes brought about by the 1972 amendments. Compensation was previously payable only if disability or death resulted from injury occurring upon "navigable waters" including "any dry



dock". Recovery was expressly forbidden if recovery could be validly provided under state workmen's compensation laws. The Supreme Court accordingly interpreted the earlier Act to reimburse only injuries seaward of the pier, e.g. on shipboard or other like structure within the narrow confines of the admiralty tort jurisdiction. *Nacirema Co. v. Johnson*, 396 U.S. 212 (1969) (no coverage under the Act for injuries to longshoremen occurring on a pier affixed to land); cf. *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971). Thus before the amendments, the Act was regarded as a rather limited supplement to state workmen's compensation laws,<sup>4</sup> designed not to supersede or improve upon those laws but to fill a gap which the states were without jurisdiction to fill. Cf. *Washington v. Dawson & Co.*, 264 U.S. 219 (1924); *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

An anomaly was then created by this narrow reliance on location or "situs" to delineate the limits of coverage—the same longshoreman who could recover if injured while working on board a ship could not recover if injured a few feet away from the ship on a pier. In *Nacirema* the Court recognized and discussed this seeming

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<sup>4</sup> During the pre-1972 period, longshoremen and harbor-workers injured on shipboard (or on land by a ship's appurtenance) could sue the vessel for unseaworthiness as well as for negligence, achieving, in some instances, recoveries far beyond anything available under the Act. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The 1972 amendments eliminated the unseaworthiness remedy for longshoremen and harborworkers while greatly increasing the benefits payable under the Act and by enlarging its scope to include injuries on piers and terminals adjoining navigable waters. The amendments also removed the express exclusion for injuries which would be covered under state workmen's compensation laws.

unfairness but felt there was little to be done.<sup>5</sup> It discussed the matter in terms of "situs" and "status", terms used by the Administrative Law Judge in the present case (Stockman's injury was said to have occurred within the "situs" provisions of the Act and his employment to meet the "status" provisions). The Court said that it was being urged to extend coverage on the basis of the "status" of longshoremen employed in performing a maritime contract, 396 U.S. at 215, but declined to do so, reading the Act as determining coverage exclusively by the "situs" of the injury. The Court went on to state,

"Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts. 7 [7. The admiralty jurisdiction in tort was traditionally 'bounded by locality,' encompassing all torts that took place on navigable waters. By contrast, admiralty contract jurisdiction 'extends over all contracts, (wheresoever they may be made or executed . . .) which relate to the navigation, business or commerce of the sea.' Since a workmen's compensation act combines elements of both tort and contract, Congress need not have tested coverage by locality alone. As the text indicates, however, the history of the Act shows that Congress did indeed do just that.] But the language of the Act is to the contrary and the background of the statute leaves little doubt that Congress' concern in pro-

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<sup>5</sup> The Court said in *Nacirema*,

"There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension [of Admiralty Jurisdiction] Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act."

396 U.S. at 223. The Court concluded that while Congress could draw whatever line it chose, "the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court." 396 U.S. at 224.

viding compensation was a narrower one." [Citations omitted.]

396 U.S. at 215-16.

Against this background, Congress enacted the 1972 amendments. With respect to "situs", it clearly shut the door on any continued interpretation of the Act's boundaries as being coextensive with the boundaries of admiralty tort jurisdiction. While disability or death must still result from an injury occurring upon the "navigable waters of the United States", these are now defined to include shoreside structures such as a pier, terminal, or "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel". Such facilities, not ordinarily considered to be "navigable waters", have always been outside the exclusive federal admiralty tort jurisdiction. They are areas where the authority of the United States to enact compensation laws for maritime workers overlaps state authority to enact workmen's compensation laws.<sup>6</sup>

Doubtless in part because of this overlap, Congress did not limit its changes in 1972 to a widening of the "situs" requirement. For the first time, it undertook to define the class of persons covered by inserting an inclusive definition of "employee", § 902(3). Thus while "status", as distinct from "situs", was formerly of minor importance, *cf. Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), it has become a matter of considerable significance. Only an "employee" is covered, defined as "any person engaged in maritime employment, including any longshoreman or other person engaged in

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<sup>6</sup> As indicated in the text, the Supreme Court went to some length in *Nacirema* to indicate that Congress had power to extend federal workmen's compensation laws for those in maritime employment shoreward, into areas outside the exclusive admiralty tort jurisdiction.

longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . .”  
§ 902(3).

## VI

In the present case, we hold that the situs requirement of § 903(a) was plainly met, in spite of the distance separating Berth 5 of the Boston Army Base from the Sea-Land berth at Castle Island. Appellants’ only substantial argument is their challenge to Stockman’s status as a member of the covered class under § 902(3).<sup>7</sup>

On the question of situs, the simple fact is that the amended Act defines navigable waters to include “any adjoining pier, wharf, . . . terminal, . . . or other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel”. § 903(a). “Adjoining” can only refer to navigable waters; and Stockman was, as even Clark concedes, working at a terminal which adjoined navigable waters. To be sure, the final reference to “other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel”, as well as other parts of the statute, suggests that Congress had in mind a terminal associated with the shipboard movement of marine cargoes. But we do not think Congress meant necessarily to limit “adjoining” to only those areas directly adjoining the berth of the specific vessel being unloaded. The terminal here in question is at a location which is customarily used in loading and unloading ves-

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<sup>7</sup> Stockman contends that since appellants did not initially shape their argument before us in terms of status, but rather urged that the Army Base facility not being contiguous with Sea-Land’s Castle Island berth, was outside the situs provision, we should decline to consider the issue of status. But status was considered both by the Administrative Law Judge and by the Board, and we think no purpose is served in bifurcating the issues at this stage, the ultimate question being one of construing the statute as a whole. In a reply brief, appellants have belatedly briefed the status issue.

sels. Some vessels do, in fact, lie there for loading and unloading. Moreover, the area is several hundred yards directly across open water from the berth of Sea-Land's container vessels and is generally part of the same Boston waterfront area. We are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters. We therefore conclude, from all these factors, that the situs requirement of § 903(a) has been met.

We thus return to what we regard as the only issue on which appellants could prevail, whether Stockman was engaged in "maritime employment" within § 902(3). We agree generally with Judge Winter, writing for the majority in *I.T.O.*, *supra*, 529 F.2d at 1084-85, that the terms "maritime employment", "longshoreman" and "longshoring operations" in § 902(3) do not have any such settled meaning that we should decide the case without resort to the legislative history.

We start with the obvious fact that the Act and the relevant House and Senate Reports speak repeatedly of longshoremen, indicating, if it could be doubted, that they are a prime class of employee intended to be benefited. Stockman, the parties stipulated, is a "longshoreman"; he belongs to the ILA; and he works at a waterfront terminal for a stevedore and terminal operator whose chief activity appears to be the handling of shipborne cargo. Clark was under contract to "unload [Sea-Land] vessels as they come into port [and] discharge the containers", and it was in connection with this latter operation that Stockman was injured.

Still, as the second circuit points out, "it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoremen-like positions as clerks or guards." *Pittston*, *supra*, at



4712. To be sure, stuffing and stripping containers is much closer to conventional longshore activity than clerking or guarding, though the analogy is not total because the containers, once landed, are transformed into trailers. The contract between the ILA and the Boston Shipping Association, in evidence here, reflects a negotiated undertaking to use only longshore labor to strip and stuff containers, and to do so exclusively at waterfront facilities. Doubtless the union insisted upon such a provision because otherwise containers could be driven to most any location and discharged there by non-waterfront labor. And its insistence upon the use of longshore labor was not totally arbitrary. Containerization greatly simplifies and speeds up the actual loading and unloading of the ship itself, cutting down the workforce needed for those operations. Much of the loading and unloading that used to take place on or alongside the ship is presumably now reflected in the stuffing and stripping of containers. From the longshoremen's point of view this is "traditional" work, and, as further discussed below, there is much to support their position.

But while such considerations indicate that stuffing and stripping—unlike clerking and guarding—cannot be dismissed as beyond the reasonable purview of longshore work, they do not tell us what coverage Congress had in mind. Before proceeding further, we set forth the relevant passages from the House Report:

#### "Extension of Coverage to Shoreside Areas

"The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury

depending on which side of the water's edge and in which State the accident occurs.

"To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. . . .

. . .

"It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters."

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess.

Two other courts of appeals have already interpreted the Act in light of these passages, coming to quite different conclusions. Judge Winter, writing in *I.T.O.* for the fourth circuit, read the committee reports as limiting coverage to those engaged in the immediate loading and

unloading of ships, particularly in view of the stated intent of the committees to achieve uniform compensation of employees who would otherwise be covered for part of their activity. The fourth circuit then went on to limit coverage to injuries occurring between the first dockside holding area and the ship.<sup>8</sup>

The second circuit, to the contrary, emphasizing the committee's concern for a "uniform compensation system", read the legislative reports as manifesting an intention to cover, rather more broadly, those taking part at the designated sites in the complex process of loading or unloading a vessel, though it rejected (as do we) one commentary's shotgun approach that "all employment related injuries which occur within the Act's territorial limits" be covered. G. Gilmore & C. Black, *Law of Admiralty* § 6-51, at 430 (3d ed. 1975), *quoted in Pitston, supra*, at 4719-20 & n. 27. In refusing to follow the fourth circuit, the second circuit made much of the fact that "employee" under the Act includes "any longshoreman" as well as "other person engaged in longshoring operations". Thus "[a] 'longshoreman' may . . . be covered at some times even when he is not engaged in traditional longshoring activity." *Id.* at 4712. We agree with Judge Friendly that, whatever the workers covered, a claimant's status need not depend wholly on the job being performed at the very moment of injury.

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<sup>8</sup> Judge Winter acknowledged that the point of rest rule so formulated might result in coverage for a longshoreman working exclusively on shore between the point of rest and the ship. While such a shorebound worker would never have been covered under the old Act, Judge Winter felt that coverage could be inferred from the committee language as a whole and the liberality of construction to be afforded remedial legislation of this type. *I.T.O., supra*, at 1088. Inexplicably, Judge Winter did not discuss the opposite side of the coin: the failure of a point of rest rule to cover a longshoreman who works part of the time on vessels but whose injury occurs while he is working at a covered situs shoreward of the point of rest.

It seems clear that, however construed, the House Committee Report, and the similar Senate Committee Report, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., go only part way towards clarifying the application of the 1972 amendments in the present situation. None of the mentioned examples refer to someone like Stockman. Stockman is plainly not an employee "whose responsibility is only to pick up stored cargo for further transshipment"; nor do we think that hauling the trailer from the Sea-Land berth to the Boston Army Base for stripping can be viewed as picking up stored cargo for transshipment. Indeed, Congress has seemingly gone out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process just as it is silent on the status of other terminal employees engaged in moving, storing and culling cargo on the pier. Still, while scarcely explicit, the legislative reports do convey several relevant messages:

1. The amendments are to be construed to achieve a "uniform compensation system" which does not depend on the "fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water".

2. The amendments are to afford coverage to employees, or possibly classes of employees, who would otherwise have been covered for part of their activity by the the earlier Act.

3. One of the reasons for affording coverage on land is that "with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore".

Attempting to reconcile these notions, we are not satisfied with the "point of rest" theory advanced by the fourth circuit. To be sure, the committee reports state that coverage is for employees who formerly would have



been covered for part of their activity, in other words those whose duties require their part-time presence on shipboard (as there would be no coverage under the old Act for purely landbased workers). But we see nothing to suggest that Congress meant, for example, to exclude from benefits a steadily employed longshoreman whose duties periodically took him aboard ship but who, at the time of injury, was engaged in moving terminal cargo shoreward of the point of rest. The fourth circuit's view would create, in effect, a further and more narrow situs requirement than that in the Act. See Judge Craven's dissent in *I.T.O. supra*, at 1096-97. Whether the status of at least a steady employee is that of a "maritime" worker, including "longshoreman", seems to us to require looking at the nature of his regularly assigned duties as a whole.

We would further comment that the fourth circuit view does not seem compatible with the "uniformity" of coverage Congress was seeking. The evil of the old Act was that it bifurcated coverage for essentially the same employment. The point of rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered. This is not to say that Congress might not have focused the generous benefits of the Act on direct loading and unloading activities to the exclusion of others. These are at the heart of the longshoreman's traditional work and may be more dangerous.<sup>9</sup> But Congress expressly included "terminal" in

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<sup>9</sup> There is no distinction made in the committee reports based on the dangerousness of the work performed. The reports do reflect a belief that state workmen's compensation payments are typically inadequate—not just, it seems, for longshoremen but for workers generally. In the sense that the 1972 Amendments are intended to provide a more adequate level of coverage, they are "remedial" and entitled, like the Act originally, to be "liberally construed in conformance with its purpose . . . ." *Voris v. Eikel*, 346 U.S. 328, 333 (1953).

the situs provisions of the Act, and we think that if a bifurcation of this sort were intended, the Act, or at least the legislative history, would have pointed to it explicitly. We therefore reject the fourth circuit's point of rest analysis.

We are more persuaded by the reasoning of the second circuit in *Pittston*, which held as follows:

"We therefore hold that the [1972] Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee had actually begun its movement from the pier (or in the case of loading, from the time when the consignee had stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel."

Slip op. at 4719. In order to arrive at (1), the *Pittston* court laid heavy stress on the specific mention in the committee reports of "the advent of modern cargo-handling techniques, such as containerization" and on the committees' recognition that this caused more of the longshoreman's work to be performed on land. It also noted the committees' sanction for coverage of "checkers" (who check the contents of containers against bills of lading) without limitation as to where the checking would be done. The court said,

"Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship . . . . Congress intended to cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-a-vis a 'point of rest.' . . . One answer to petitioners' argument

that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did. . . . We fail to perceive any significant difference because, for the convenience of someone, it [the container] had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed." [Footnote deleted.]

Slip op. at 4714.

Except in one respect, discussed later, we find Judge Friendly's analysis with respect to handling the contents of containers not only persuasive but compelling. The historical work of longshoremen was said to be, "in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers." *Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884, 886 (2d Cir. 1970). This conforms to the usual obligation of the ship "[t]o unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it." *American Presidential Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887, 888 (D.C. Cir. 1962).

If a container is discharged from a vessel containing goods for a number of consignees neither the shipowner nor the longshoremen will have completed their work until the container is stripped and the cargo sorted so as to be accessible to the consignees. We agree with Judge Friendly that it can make little difference with respect to the longshoreman's activity whether the stripping and sorting is done where the container first comes to rest on the pier or shoreward of that point. If there

is a relevant difference, Congress has not mentioned it. The committees do emphasize that coverage is not intended for employees "who are not engaged in loading [or] unloading . . . a vessel"; but it seems both reasonable and consistent with existing practice, to view the unloading process as not yet complete so long as unsorted goods destined for various consignees remain inside the original container within which they were shipped, even though the containers have already been removed from the hold of the vessel. On this premise, one stripping a container retains the status of a "longshoreman" and is "engaged in longshoring operations".

The most troublesome question, as we see it, is reconciling this view with the statement in the committee reports that the compensation system of the Act is to apply to employees who would otherwise be covered for part of their activity. That statement, as well as other parts of the committee reports, indicates that Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels (or else repaired or built them) and who fit such traditional maritime designations as longshoreman, harborworker, and the like. Thus, as indicated previously, we quite agree with the second circuit that clerks and other like terminal workers are excluded.

The problem is whether those performing longshoring operations, like Stockman, are also to be excluded unless they can demonstrate that part of their normal duties requires them to go aboard a ship—or, as Judge Friendly said (with respect to "cargo handlers", but not strippers or stuffers), unless "the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel". *Pittston, supra*, at 4719.

We conclude, however, in accord with the second circuit, that there is no need for such a showing in the



case of persons employed, like Stockman, in the stripping of containers containing unsorted cargo, destined for several consignees, at a location within the situs requirement. Such an individual, like a longshoreman working on the pier alongside a ship during unloading operations, is a longshoreman within § 902(3). Whatever the language of the committee reports, the statute itself calls for no additional showing once that status has been firmly established. It is clear, as indeed Judge Winter recognizes, *I.T.O. supra*, at 1088, that even longshoring work in its traditional form is at times organized so that some workers remain at all times on the pier as part of a continuous loading or unloading process. See *Garrett v. Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1974). Plainly such men are no less longshoremen than their brethren on the vessel. While Congress did not mean in the 1972 amendments to cover new classes of employees not heretofore covered in part, we do not believe it meant to exclude from coverage those particular members of a covered group, e.g. longshoremen, whose individual duties do not happen to take them on shipboard. We read the language of the committee reports as requiring bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act—not necessarily a demonstration by each claimant that he individually would have been covered.

This is not to say that workers who are not plainly longshoremen, or otherwise plainly included in some recognized category of maritime employment, may not have to demonstrate their entitlement to coverage by showing that their duties encompass shipboard activity. Something like this thinking doubtless accounts for clause (2) of the second circuit's formulation, relating to "cargo handlers" as distinct from those stuffing or stripping containers. We expressly do not decide this matter now.



since it is not before us. We hold only that an employee like Stockman, being a longshoreman and engaging in longshoring operations, comes within the status requirement of the Act.

*Affirmed. Costs for appellees.*

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APPENDIX F

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 75-2039

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SEA-LAND SERVICE, INC., AND  
THE TRAVELERS INSURANCE COMPANY,  
*Petitioners,*

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR, AND  
WALLACE C. JOHNS,  
*Respondents.*

(Benefits Review Board Nos. 75-124 & 75-124A)

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ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS  
REVIEW BOARD UNITED STATES DEPARTMENT OF LABOR

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Argued June 8, 1976  
Before ALDISERT, GIBBONS and GARTH,  
Circuit Judges

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OPINION OF THE COURT  
(Filed Aug. 5, 1976)

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GIBBONS, Circuit Judge

This is a petition by an employer to review an order of the Benefits Review Board reversing an order of the administrative law judge which denied benefits to an employee, Wallace Johns, under the Longshoremen's and

Harbor Workers' Compensation Act (LHWCA).<sup>1</sup> The administrative law judge had held that although Johns was engaged in maritime employment at the time of the accident, he was not injured at a situs within the coverage of the Act. The Board concluded that Johns was engaged in maritime employment and was injured at a covered situs. The problem arises out of the 1972 amendments to the LHWCA,<sup>2</sup> and is of first impression in this court.

Johns was employed at the time of the accident by Sea-Land Service, Inc., an intermodal freight carrier that engages in shipping, stevedoring, warehousing, freight consolidation and motor freight operations. Johns' injury occurred when the flatbed truck he was driving, laden with a large crate, overturned on a public street in Port Elizabeth, New Jersey. Port Elizabeth is a part of the sprawling marine terminal area in Newark and Elizabeth, New Jersey that is operated by the Port of New York and New Jersey Authority. Many longshoremen who are covered by the LHWCA are employed at various locations in the marine terminal area. Many other workers in the terminal area are employed by railroads, and are covered by the Federal Employers' Liability Act.<sup>3</sup> Still others, including teamsters, warehousemen, clerks, secretaries and even bank tellers, who work in the marine terminal area are covered by the New

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<sup>1</sup> 33 U.S.C. §§ 901-50. We have jurisdiction under 33 U.S.C. § 921(c) for although the Benefits Review Board ordered a remand to the administrative law judge for the calculation of the exact amount of benefits, that calculation was made and the order was for all purposes final by the time this court was called upon to consider the petition. *Compare* Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board, No. 75-1715 (3d Cir. 1976).

<sup>2</sup> Pub. L. No. 92-576, 86 Stat. 1251.

<sup>3</sup> 45 U.S.C. §§ 51-60.

Jersey Workmen's Compensation Act.<sup>4</sup> All, or at least most, of these employees, are engaged in facilitating the transfer of cargo at the interface between waterborne modes of transportation and land or airborne modes of transportation. Our problem in this case is to determine on which side of the interface Johns was employed when he was injured. That his employer is an intermodal carrier complicates the problem somewhat, although analytically the fact that a single corporate employer operates several modes of transportation should not influence our judgment respecting the statutory reach of the federal and state workmen's compensation laws.

## I

Johns was a member of the International Longshoremen's Association, but he was not regularly employed by Sea-Land. On the date of the accident Johns had been hired by Sea-Land for the day (a "shape-up" employee) through the Bi-State Waterfront Commission, which operates a longshoring hiring hall. After appearing for work, Johns agreed to work as a shuttle driver, moving with a tractor rig trailers between Sea-Land's old terminal facility at Berth 52, and its new terminal at Berth 90. Both terminal facilities were enclosed by a fence and were under the control of the employer. The shuttle-run between the two terminals followed public streets for a distance greater than a mile and a half. Johns began his day by hitching a trailer to his tractor at Berth 52 and moving it to Berth 90. While he was making a turn from Rangoon Street onto Bombay Street, an intersection in the public area of the marine terminal, situated one-half mile from the nearest water and one-third mile from Sea-Land's property, the rig overturned and caused Johns' injury. On the day of the accident

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<sup>4</sup> N.J. Stat. Ann. § 34:15.



Sea-Land was in the process of moving its operations from Berth 52 to a larger facility at Berth 90.

Johns originally filed a claim against Sea-Land with the New Jersey Department of Labor and Industry. Payments were made under the New Jersey schedule from January 31, 1973 until March 16, 1973. On July 5, 1973 Johns filed a new claim under the federal statute, which provides for higher benefits. Sea-Land resisted that claim, contending that at the time of the injury the claimant was covered by the New Jersey and not the federal statute. The formal proceedings before the administrative law judge and the Benefits Review Board produced the results described above. Neither the administrative law judge nor the Board made any findings with respect to the contents of the crate that Johns was hauling at the time of the accident, its origin, or its destination. Nor did either make any finding as to whether a vessel was berthed at or expected at Berth 52. Under our interpretation of the 1972 amendments these facts may be of critical importance.

## II

Prior to 1972 the term "employee" was defined in § 2(3) of the LHWCA, 33 U.S.C. § 902(3) only negatively:

"The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

The scope of the Act's affirmative coverage was derived from the definition of "employer" in § 2(4), and the "coverage" provision in § 3(a). An "employer" was described as an employer of persons "employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. § 902(4). Compensation was payable under

§ 3(a) "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death-through workmen's compensation proceedings may not validly be provided by State law." 33 U.S.C. § 903(a) The pre-1972 definitions had originated in the 1927 statute, which was tailored by Congress to fill a void created by the Supreme Court's holding in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), that state workmen's compensation laws were inoperative in the navigable waters of the United States. See G. Gilmore & C. Black, *The Law of Admiralty* § 6-45 (2d ed. 1975). The *Jensen* decision left longshoremen injured on the landward side of a pier with a possible remedy under state workmen's compensation laws, but in the absence of federal legislation not covered when they stepped from the pier onto the gangplank. *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922). The 1927 statute, instead of adopting federal coverage for the entire longshoring operation, merely provided a remedy which filled in the gap created by the *Jensen* holding. See Gilmore & Black, *supra*, § 6-48, at 417. In *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), the Court held that the Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C. § 740, did not change the basic approach of the 1927 statute, and that pierside injuries were still covered by state workmen's compensation laws. The *Nacirema* court made it clear, however, that there was no constitutional barrier to congressional action preempting the entire longshoremen's compensation field to the exclusion of state law.<sup>5</sup> It merely held that the 1927 statute

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<sup>5</sup> The Court said:

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain

could not be so construed. That holding pointed up the continuing anomaly that the schedule of benefits to be applied in any case depended on whether the injury occurred on the land or water side of the gangplank.

In 1972 Congress addressed this anomaly in a complex statute reflecting a number of compromises among conflicting interests.<sup>6</sup> Of concern for purposes of this case are the revised definitions of "employer," § 2(3), and "employee," § 2(4), and the revised "coverage" provision of § 3(a). In place of the merely negative definition of "employee" given by the 1927 Act (which excluded crew members), Congress substituted the following language: -

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of

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outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24.

<sup>6</sup> We have considered other aspects of the 1972 amendments in *Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs*, No. 75-1810 (3d Cir. June 23, 1976) and *Nacirema Operating Co. v. Benefits Review Bd.*, No. 75-1984 (3d Cir. July 2, 1976). See also *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 38-41 (3d Cir. 1975), *cert. denied*, 96 S.Ct. 785 (1976).

any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

33 U.S.C. § 902(3).

Thus the exclusion of crew members<sup>7</sup> was retained, but an affirmative listing of occupations functionally related to the maritime transportation industry was added. For this case the key words are "longshoreman or other person engaged in longshoring operations."

The 1972 amendments also changed the "employer" definition by omitting the limitation "upon the navigable waters of the United States" and substituting

"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

33 U.S.C. § 902(4).

The new definition quite clearly was intended to afford coverage in places which under the 1927 statute had been left to the state workmen's compensation acts. That this was intended is confirmed by the "coverage" provision. The 1972 amendment to § 3(a) omitted the qualification "and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law," and thus abandoned the 1927 approach of providing a mere interstitial remedy which deferred to state law to the maximum extent permissible under the *Jensen* holding. As amended, § 3(a) provides:

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<sup>7</sup> Crewmen may, of course, recover for injury under the Jones Act, 46 U.S.C. § 688.

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."

33 U.S.C. § 903(a).

Thus the "coverage" provision and the "employer" definition manifest an unmistakable congressional intention to afford federal coverage for injuries occurring in areas inland of the navigable waters of the United States where prior to 1972 Congress had deferred to state law. *See generally* Gilmore & Black, *supra*, § 6-50.

### III

In considering the merits of Johns' claim for compensation under the LHWCA as amended, both the administrative law judge and the Benefits Review Board construed the Act to posit twin requirements for coverage. In the definition of "employee" they perceived a "status" test, i.e., whether Johns was "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . .["] The Board and the administrative law judge understood § 2(4), the employer definition section, to impose an additional requirement for coverage; namely, that an accident occur upon the navigable waters of the United States (including enumerated adjoining facilities). The Board and the administrative law judge agreed that Johns satisfied the status test. The administrative law judge concluded, however, that the accident took place at a situs that the 1972 amendments did not reach. It was this latter conclusion



with which the Benefits Review Board disagreed.<sup>8</sup> Because of the inadequacy of the record compiled in the administrative proceedings, we are not in position to either approve or disapprove the Board's decision and must remand for additional fact-finding. Nor are we certain that the Board has properly interpreted the scope of the 1972 amendments, a task of no little difficulty as several diverging opinions demonstrate. See, e.g., *Pittston Stevedoring Corp. v. Dellaventura*, No. 76-4042 (2d Cir. July 1, 1976); *I.T.O. Corp. v. Benefits Review Board*, 529 F.2d 1080 (4th Cir. 1975), rehearing en banc granted, (March 12, 1976); *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3645 (U.S. May 6, 1976) (No. 75-1620), and one to which we now turn.

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<sup>8</sup> The Board's entire discussion of this point of disagreement was set out in two paragraphs:

The administrative law judge relied essentially on *Perdue v. Jacksonville Shipyards, Inc.*, 74-LHCA-58 (Sept. 19, 1974), in determining that the accident did not occur upon "navigable waters". The Board has since reversed that decision, and no purpose would be served by restating our reasoning here. See *Perdue v. Jacksonville Shipyards, Inc.*, 1 BRBS 297, BRG No. 74-200 (Jan. 31, 1975).

The Act does not require that the injury occur on property owned by the employer. It is enough if the accident takes place in an "... adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. § 903(a). The situs of claimant's injury qualifies as such an area since it is directly related to, and an essential part of, the employer's longshoring operations. To hold otherwise would contravene the legislative intent of the 1972 amendments to the Act, which were enacted, in part, to eliminate the circumstance of having persons engaged in maritime employment walk into and out of the Act's coverage during the workday. See *Herron, Jr. v. Brady Hamilton Stevedore Co.*, 1 BRBS 273, BRB No. 74-171 (Jan. 23, 1975); *O'Leary v. Southeast Stevedore Co.*, 1 BRBS 498, BRB No. 74-228 (May 30, 1975).

## IV

As has been noted, see *Southern Pacific Co. v. Jensen*, *supra*, the Constitution forbids state compensation laws to intrude on the navigable waters of the United States. On those waters the federal law-making power is exclusive, but the scope of congressional power to enact federal compensation legislation pursuant to its admiralty jurisdiction is, of course, defined by the test of navigability. *State Industrial Commission v. Nordenholt Corp.*, *supra*; *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 210 (1971). Doubtless Congress could, in lawful exercise of its commerce power, have supplanted state workmen's compensation remedies throughout the entire range of interstate and foreign commerce. But if a suit for workmen's compensation is an action at law for purposes of the seventh amendment, then any federal compensation law whose coverage extended beyond the limits of admiralty jurisdiction could not be administered under the existing scheme, without provision for jury trial. See *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1207 (3d Cir. 1974), *on rehearing in banc*, 519 F.2d 1215, 1219 (3d Cir. 1975) (Gibbons, J., dissenting), *cert. granted*, 44 U.S.L.W. 3531 (U.S. Mar. 22, 1976) (No. 75-748); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 609-10 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). To the extent that compensation claims concern subject matter within Congress' legislative jurisdiction in admiralty, however, it is well-settled that no right to jury trial exists. *Crowell v. Benson*, 285 U.S. 22, 45 (1932); *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. [12 How.] 443, 452-53, 459-60 (1851); *Waring v. Clarke*, 46 U.S. [5 How.] 441, 459-60 (1847). Because we assume Congress was aware of the administrative difficulties that would attend upon a commerce-based federal compensation law, we do not believe that in enacting the 1972 amendments to the LHWCA, Congress intended to

exercise any legislative power other than its admiralty jurisdiction." See *Pittston Stevedoring Corp. v. Dellaventura*, *supra*, No. 76-4042 at 4720-22; Gilmore & Black, *supra*, § 6-48 at 417-18. Our problem then, is to decide the extent to which Congress has exercised the power vested in it by Article III, Section 2 of the Constitution. *Panama R.R. v. Johnson*, 264 U.S. 375, 386 (1924).

It seems likely, although by no means certain, that Congress could, pursuant to its admiralty jurisdiction, enact a comprehensive workmen's compensation law for maritime employees that provided coverage for injuries sustained in such employment, no matter where they may occur. Justice Story described the admiralty jurisdiction in tort as limited to events actually taking place on the waters, see *DeLovio v. Boit*, 7 Fed. Cas. 418, 444 (No. 3,776) (C.C.D. Mass. 1815), while at the same time describing admiralty jurisdiction in contract as comprehending

"all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea."

*Id.* See also *Insurance Co. v. Dunham*, 78 U.S. [11 Wall.] 1, 35 (1870). A claim for compensation for personal in-

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\* The problem of tracing congressional legislation to its intended constitutional source is often perplexing in the maritime context because admiralty jurisdiction closely interfaces with commerce jurisdiction. When Congress in 1845 extended admiralty jurisdiction to the Great Lakes and navigable waters connecting same, Act of Feb. 26, 1845, 5 Stat. 726, it was much mooted whether the Act was a regulation of commerce or of admiralty. There is some evidence that Justice Story, the draftsman of the legislation, regarded the Act as an exercise of commerce power, although the Supreme Court sustained the Act on the latter ground, expressly disavowing the commerce clause basis. See *Propeller Genesee Chief v. Fitzhugh*, *supra*. For an absorbing discussion of the problem see C. Swisher, *History of the Supreme Court of the United States, Vol. 5: The Taney Period, 1836-64* at 423-66 (1974).

jury on a theory of strict liability does not fit perfectly into the mold of either admiralty tort or admiralty contract law. We find guidance in determining the limits of congressional law-making authority respecting such subject matter in contract and other cases where the jurisdictional limits are not spatially defined, but depend on the presence of a nexus between the employer-employee relationship and maritime commerce. The maintenance and cure cases are particularly good analogies, because the seaman's right to maintenance and cure is closely related to the workman's right to compensation without fault for injury or death. See *Gilmore & Black, supra*, § 6-6, at 281-82. The right to maintenance and cure arises from the fact of the employment relationship (in the service of the ship) and amounts virtually to strict liability. It is now clearly established that a seaman who is stricken with illness or injury is entitled to maintenance and cure even though the accident or illness occurs during shore leave not directly connected with the ship's business. See *Warren v. United States*, 340 U.S. 523 (1951); *Farrell v. United States*, 336 U.S. 511 (1949); *Aquilar v. Standard Oil Co.*, 318 U.S. 724 (1943). By the same token, it should be within Congress' legislative jurisdiction under Article III, Section 2 to provide a remedy for persons injured in the course of maritime employment, irrespective of the place of injury. It is the existence of the special employer-employee relationship, and not the situs of that relationship, that is significant for purposes of admiralty jurisdiction. We find support for this thesis in *Victory Carriers, Inc. v. Law, supra*, where the Supreme Court indicated that only congressional inaction stood between the Court's acquiescence in the extension of admiralty tort jurisdiction shoreward from its historical outpost on the edge of the navigable waterways. See 404 U.S. at 204, 214. See also *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1962).

Having fixed the limits of congressional law-making authority in admiralty, it remains to be considered the extent to which Congress in the 1972 amendments to the LHWCA invoked that power. We are met at the outset with a conflict of authority. Both the administrative law judge and the Benefits Review Board employed concurrent tests of "status" and "situs" to define the Act's coverage. *Accord, I.T.O. Corp. v. Benefits Review Board, supra*. Gilmore and Black acknowledge that there is evidence in the legislative history suggesting that Congress intended to structure the Act's coverage in such a fashion, but urge for policy reasons that the status test be discarded and the situs test be made determinative. See Gilmore & Black, *supra*, § 6-51. Judge Friendly rejects this latter position, but concededly adopts an approach that "goes some way" toward "read[ing] the status requirement out of the Act." *Pittston Stevedoring Corp. v. Dellaventura, supra*, No. 76-4042 at 4719. Although we find merit in these positions, we prefer to view the problem from a fresh perspective.

Prior to the 1972 amendments to the LHWCA, coverage analysis of necessity involved application of the bifurcated status-situs test. The *Jensen* case fixed the constitutional limit of the state law-making authority to which Congress deferred at the boundary of congressional legislative jurisdiction in admiralty, i.e., at the edge of the navigable waterways. The 1927 Act established a federal compensation remedy for maritime employees, but only to the extent necessary to fill *Jensen's* preemptive void. There was a perfect interface, without overlap, between federal and state law, see *Nacirema Operating Co. v. Johnson, supra*, and courts were forced to consider in each case, from the location of the accident, whether state or federal remedies were to be provided.

In the 1972 amendments, however, Congress abandoned the policy of deference to state law-making power.



It invaded what had theretofore been the sole preserve of the states by extending the LHWCA's coverage to some part of the domain in which the states could legislate. The line delimiting the outer reaches of the Act's extended coverage is, we think, functional and not spatial.

Apart from increasing the maximum allowable benefits in exchange for the elimination of the *Sieracki-Ryan*<sup>10</sup> circle of liability, the dominant purpose of the 1972 amendments in extending the Act's coverage to areas previously left to the states was to make more uniform the death and disability compensation system for maritime employees so that maritime workers would no longer walk into federal coverage and out of state coverage, and vice versa, in the course of a day's work. This sentiment is clearly expressed in identical language in both the House and Senate reports accompanying the legislation:

#### EXTENSION OF COVERAGE TO SHORESIDE AREAS

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come

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<sup>10</sup> *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). See *Griffith v. Wheeling Pittsburgh Steel Corp.*, *supra*, 521 F.2d at 38-40.

nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. . . .

. . . .

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of a crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately trans-

ported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News 4707-08. The reference in §§ 902(4) and 903(a) to the navigable waters of the United States should be regarded no more than a shorthand way of relating the function being performed by the injured employee to waterborne transportation, the jurisdictional nexus. We recognize that both of these statutory provisions, as amended in 1972, further state that the "navigable waters" shall include "any adjoining pier, wharf, dry dock, terminals, building van, marine railway, or other adjoining area customarily used by an em-

ployer in loading, unloading, repairing, or building a vessel." But we do not construe this enumeration of covered areas to be an exclusive enumeration. Congress was cautious in its language, but the fact remains that it intended to expand the scope of the LHWCA to provide a federal workmen's compensation remedy for all maritime employees. We believe that Congress has exercised in full its legislative jurisdiction in admiralty. As long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available. Resuscitating the situs requirement in cases satisfying the status test will interfere with Congress' intention to eliminate the phenomenon of shifting coverage. It is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of the injury, that in our view Congress referred to by its reference to navigable waters.

We concede, as we must, that the draftsmanship of the 1972 amendments leaves something to be desired and, to a certain extent, obscures this purpose from view. But the overall intention appears to be to afford federal coverage to all those employees engaged in handling cargo after it has been delivered from another mode of transportation for the purpose of loading it aboard a vessel, and to all those employees engaged in discharging cargo from a vessel up to the time it has been delivered to a place where the next mode of transportation will pick it up. A stevedore may receive cargo at one situs and move it over public streets to another situs for loading on a vessel, or may discharge cargo and transport it to a situs not immediately adjacent to a pier for delivery to a truck or rail carrier. The limits of federal coverage is defined not by reference to a geographic relationship with the navigable waters of the United States, but by the location of the interface between the air[,] land and the water modes of transportation. If that interface is customarily

located at some point remote from the pier, the fact that the stevedore uses public streets to move the cargo to or from a "terminal", a "building" or "other adjoining area" does not affect coverage. The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing.

We believe that our view of the 1972 amendments is in substantial conformity with that of Judge Craven, dissenting from the panel opinion in *I.T.O. Corp. v. Benefits Review Board*, *supra*. In that case a divided court held that the 1972 amendments preserved the dual status-situs test for coverage, and that federal coverage began at the "first storage or holding area on the pier, wharf, or terminal adjoining navigable waters", and ended at the "last storage or holding area on the pier, etc., to the ship," which it called the "point of rest." 529 F.2d at 1087 (emphasis in original). Judge Craven in dissent rejected the "point of rest" analysis as inconsistent with the plain language of the Act, *accord*, *Pittston Stevedoring Corp. v. Dellaventura*, *supra*, No. 76-4042 at 4712, and urged that longshoring under the statute was a continuous process involving different employees, which continued at all times while the cargo was in maritime commerce as distinguished from land commerce. Although Judge Craven's terminology and ours are somewhat different, we think that our perceptions of the congressional intention are essentially the same. The line which Congress intended to draw was between the maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter. That the one employer may be engaged in both types of commerce is irrelevant. The line should still be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation.



We note that defining the scope of federal workmen's compensation coverage in this manner is consistent with the provisions of the Harter Act, 46 U.S.C. § 193, and the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(3), defining the point at which the responsibility of the maritime carrier begins. While these statutes do not tell us what the Ninety-Second Congress had in mind when it passed the LHWCA amendments, there is some virtue in a construction of the latter statute that produces consistency with other enactments relating to maritime commerce.

## V

We are thus in agreement with the Benefits Review Board that coverage under the Act is not foreclosed by the fact that the accident occurred on a public street in the marine terminal not under the employer's control. But that conclusion only begins the appropriate inquiry. On the day of the accident, according to the evidence, Johns, at Berth 52, hitched a Sea-Land tractor to a container which had just come off a ship at that berth, and took the container to Berth 90, where Sea-Land stored containers. If Johns were an over-the-road driver who picked up the trailer on the pier for delivery to a consignee elsewhere, we would have no difficulty in holding that the interface between water and land transportation took place at Berth 52 and that New Jersey law covered any subsequent injury to the driver. On the other hand, transporting a discharged container to a temporary storage area at Berth 90 appears equally clearly to be related to the stevedoring function rather than to the land transportation function. Likewise, if the crate which Johns was moving at the time of the accident had been received at Berth 90 from a land mode of transportation, or even another water carrier, for temporary storage until it could be loaded on a vessel, and Johns was moving it to Berth 52 to be so loaded,

we would hold that there was federal coverage at the time of the accident.

Our difficulty is that while the evidence respecting Johns' initial trip between Berth 52 and Berth 90 is clear enough, the record is decidedly equivocal about the return trip, during which the accident occurred. Johns testified that he thought the crate was full and was going to a ship, but he gave no information about its source and no other information about its destination. The testimony of William Warnock, the employer's claims adjuster, suggested that Johns may have been mistaken, and may actually have been shuttling equipment between the two terminals, where warehousing and the storage of trailers also takes place. Neither the administrative judge nor the Board made specific findings on this crucial issue. What is clear is that shape-up laborers, hired by the day, are sometimes used to perform what are clearly tasks in maritime employment and are sometimes used in Sea-Land's trucking and warehousing operations. All are members of the longshoremen's union, but obviously that fact is not dispositive of the reach of the federal statute. A great deal of the evidence and argument in the agency proceedings was devoted to the situs of the accident and to control over that situs. Evidence bearing upon the specific function of Johns at the time of injury was inadequately developed. Because the inquiry in the proceedings below was misdirected, a remand is necessary.

## VI

The Director, Office of Workers' Compensation Programs, contends that Sea-Land's petition for review should be dismissed because the employer did not cross-appeal to the Benefits Review Board from the favorable decision of the administrative law judge. The simple answer is, as we pointed out in *Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs*,

No. 75-1810 (3d Cir. June 23, 1976), that the employer was not aggrieved by that order and could not take an appeal therefrom to the Benefits Review Board. 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.201(a) (1974). Sea-Land was aggrieved by the Board's action, however, and properly seeks judicial review.

### Conclusion

The order of the Benefits Review Board will be set aside and the case will be remanded for a determination, consistent with this opinion, as to whether at the time of the injury Johns was engaged in maritime or non-maritime employment. On remand the trier of fact<sup>11</sup> may take additional testimony on that issue if in its view the present record does not contain sufficient evidence for that purpose.

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### TO THE CLERK OF THE COURT

Please file the foregoing opinion.

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Circuit Judge

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<sup>11</sup> Under the statute the administrative law judge and not the Benefits Review Board is the trier of fact. See 33 U.S.C. § 921(b)(3).

112a

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 75-2039

SEA-LAND SERVICE, INC., AND  
THE TRAVELERS INSURANCE COMPANY,  
vs. *Petitioners*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR, AND WALLACE  
C. JOHNS,

*Respondents*

ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS  
REVIEW BOARD UNITED STATES DEPARTMENT OF LABOR

Present: ALDISERT, GIBBONS and GARTH, *Circuit  
Judges*

JUDGMENT

This cause came to be heard on the record from the Benefits Review Board, United States Department of Labor and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said Benefits Review Board dated July 11, 1975, be, and the same is hereby set aside and the cause is remanded for a determination, consistent with the opinion of this Court, as to whether at the time of the injury Johns was engaged in maritime or non-maritime employment.

ATTEST:

/s/ M. Elizabeth Ferguson  
Chief Deputy Clerk

August 5, 1976

APPENDIX G

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 75-1051

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I.T.O. CORPORATION OF BALTIMORE, EMPLOYER,

and

LIBERTY MUTUAL INSURANCE COMPANY, CARRIER,  
*Petitioners,*

v.

BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR,  
*Respondent,*

WILLIAM T. ADKINS,  
*Respondent,*

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION,  
*Amicus Curiae.*

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No. 75-1075

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MARITIME TERMINALS, INC., AND  
AETNA CASUALTY AND SURETY CO.,  
*Petitioners,*

v.

SECRETARY OF LABOR, AND DONALD D. BROWN,  
*Respondents.*



114a

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No. 75-1196

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MARITIME TERMINALS, INC., AND  
AETNA CASUALTY AND SURETY CO.,  
v. *Petitioners,*

VERNIE LEE HARRIS, AND  
UNITED STATES DEPARTMENT OF LABOR,  
*Respondents.*

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No. 75-1088

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NATIONAL ASSOCIATION OF STEVEDORES

AND

CALIFORNIA STEVEDORE & BALLAST CO., CAROLINA SHIP  
PING COMPANY, THE CHESAPEAKE OPERATING COM-  
PANY, CILCO TERMINAL CO., INC., JOHN T. CLARK &  
SON OF BOSTON, BERNARD S. COSTELLO, INC., DIXIE  
STEVEDORES, INC., ELLER & COMPANY, INC., GLOBAL  
TERMINAL & CONTAINER SERVICES, INC., FEDERAL MA-  
RINE TERMINALS, INC., GULF STEVEDORE CORP., HAR-  
RINGTON & COMPANY, INC., HOWLAND HOOK MARINE  
TERMINAL CORP., INDEPENDENT PIER CO., INTERNA-  
TIONAL GREAT LAKES SHIPPING CO., INTERNATIONAL  
TERMINAL OPERATING CO., INC., LAKE CHARLES STEVE-  
DORES, INC., LAVINO SHIPPING CO., LUCKENBACH STEAM-  
SHIP CO., INC., MCCABE, HAMILTON & RENNY CO., LTD.,  
JOHN W. MCGRATH CORP., MAHER TERMINALS, INC.,

MATSON TERMINALS, INC., METROPOLITAN STEVEDORE  
 CO., NACIREMA OPERATING CO., INC., NEW BEDFORD  
 STEVEDORING CORP., NORTHEAST MARINE TERMINAL CO.,  
 INC., OLD DOMINION STEVEDORING CORP., JOHN J. ORR  
 & SON, INC., PALMETTO SHIPPING & STEVEDORING CO.,  
 INC., PATE STEVEDORING CO., P. C. PFEIFFER CO., INC.,  
 PITTSTON STEVEDORING CORP., PORT STEVEDORING COM-  
 PANY, INC., RYAN-WALSH STEVEDORING CO., INC.,  
 SHIPPERS STEVEDORING CO., T. SMITH & SON, INC.,  
 STRACHAN SHIPPING CO., TRANSOCEANIC TERMINAL  
 CORP., UNIVERSAL MARITIME SERVICE CORP., WESTFALL  
 STEVEDORE CO., WILMINGTON SHIPPING CO., YOUNG  
 AND COMPANY OF HOUSTON, ITS MEMBER COMPANIES,

*Petitioners,*

v.

BENEFITS REVIEW BOARD, U.S. DEPT. OF LABOR,  
*Respondent,*

WILLIAM T. ADKINS,  
*Respondent.*

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On Rehearing In Banc.

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Argued May 4, 1976

Decided Aug. 26, 1976

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Before HAYNSWORTH, Chief Judge, WINTER, CRA-  
 VEN, BUTZNER, RUSSELL and WIDENER, in banc.

---

David R. Owen (Francis J. Gorman, Semmes, Bowen &  
 Semmes on brief) for Petitioners in 75-1051; John B.  
 King, Jr. (Vandeventer, Black, Meredith & Martin on  
 brief) for Petitioners in 75-1075 and 75-1196; Donald A.  
 Krach (William C. Stifler, III, Paul B. Lang, Niles, Bar-  
 ton & Wilmer, Thomas D. Wilcox, on brief) for Peti-

tioners in 75-1088; Linda L. Carroll, Attorney (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor, George M. Lilly, Karen L. Gilbert, Attorneys, United States Department of Labor, on brief) for Respondents in 75-1051, 75-1075, 75-1080 and 75-1196; Amos I. Meyers (Terry Paul Meyers on brief) for Respondents in 75-1051 and 75-1088; Charles S. Montagna for Respondents in 75-1075 and 75-1196; Thomas W. Gleason, Jr. (Herzl S. Eisenstadt, Richard H. Kapp on brief) for International Longshoremen's Association, AFL-CIO as Amicus Curiae.

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WINTER, Circuit Judge:

These consolidated appeals present two major questions: (1) the extent of coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (sometimes "LHWCA"), to persons engaged in the necessary steps in the overall process of loading and unloading a vessel but who, prior to the Amendments, could claim benefits for accidental injury or death, sustained in the process, only under state law; and (2) whether, in a petition for review under 33 U.S.C. § 921(c), the Director, Office of Workers' Compensation Programs, Department of Labor, is a proper respondent. The appeals were first heard and decided by a divided panel of the court. *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4 Cir. 1975). Chief Judge Haynsworth and I, comprising the majority, held that during the loading and unloading process the coverage of the Act extended to the first (last) point of rest. As applied to the facts, this holding resulted in the conclusion that none of the three claimants was entitled to benefits. Judge Craven was of a contrary view. He would have held that the three claimants were engaged in mari-

time employment on navigable waters of the United States, as defined in the Act, and hence they should be entitled to benefits under the Act for their accidental injuries. The panel was unanimous in deciding that the Director was not a proper respondent, although it was recognized that, in a proper case, he might be permitted to become an intervenor.

Because of the importance and novelty of the questions decided, the entire court granted cross-petitions for rehearing and reheard the appeals in banc. At the time the appeals were reargued, the in banc court consisted of six judges.

### I.

On the issue of the extent of the Act's coverage, Chief Judge Haynsworth, Judge Russell and I subscribe to the views expressed in the majority panel decision. Judge Widener subscribes to the principle expressed in that opinion, although he defines the exact point between coverage and non-coverage somewhat differently.

In his application of the principle, Judge Widener concludes that the claimant Adkins is not covered by the Act, but that claimants Brown and Harris are covered. He reasons that the test of coverage is whether an otherwise eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship. In Adkins' case, a container was removed from the ship and stored in the marshaling area. From there the container was moved to a shed where it was stripped and the contents were stored. Adkins was injured when he was moving the contents from the storage area onto a waiting delivery truck. The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins, in Judge Widener's view, was thus not covered

because he was not participating in the unloading process; he was handling the goods for transshipment. Accordingly, Judge Widener concurs in the judgment of Chief Judge Haynsworth, Judge Russell and me to reverse Adkins' award.

In Brown's case, the cargo was brought from somewhere inland and deposited in a warehouse. Brown, operating a forklift, picked up cargo and stuffed it into a container. While stuffing the container, Brown was injured. When the stuffing would have been completed, a hustler would have carried the container to the marshaling area, and from there the container would have been taken to the pier to be loaded on board. Thus, in Judge Widener's view, Brown was engaged in the overall process of loading the ship. The cargo was not merely being moved to storage for convenience or facility; the cargo was in the process of being loaded on board ship, and Brown was engaged in the loading process. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Brown.

Harris was a hustler who was injured while he was taking a container, stuffed with goods which had been stored after inland delivery, from the stuffing area to the marshaling area. From the marshaling area, the container would have been taken to the pier where it would have been loaded on board. The goods were being moved solely for loading purposes, not for mere convenience, and therefore, in Judge Widener's view, Harris, like Brown, was engaged in the overall process of loading the ship. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Harris.

Judge Craven and Judge Butzner subscribe to the views expressed by Judge Craven in his dissenting panel opinion, and for those reasons and the additional reasons



expressed by Judge Butzner in his separate opinion attached hereto, they vote to affirm the awards made to Adkins, Brown and Harris.

By the majority votes of Chief Judge Haynsworth, Judge Russell, Judge Widener and me, the award to Adkins (Nos. 75-1051 and 75-1088) is reversed. By an equally divided court, the awards to Brown and Harris (Nos. 75-1075 and 75-1196) are affirmed.

## II.

On the issue of whether the director is a proper respondent, an issue raised only in Nos. 75-1051 and 75-1088, Chief Judge Haynsworth, Judge Russell, Judge Widener and I subscribe to the views expressed in the majority panel decision as hereafter amplified. Judge Craven and Judge Butzner subscribe to the views expressed in Judge Butzner's separate opinion attached hereto.

## III.

Chief Judge Haynsworth, Judge Russell, Judge Widener and I amplify our conclusion that the Director is not a proper respondent as follows:

Prior to the 1972 Amendments, the Act provided for judicial review by an injunction suit against the deputy commissioner making a compensation award. The pertinent part of 33 U.S.C. § 921(b) (1970), *as amended*, 33 U.S.C. § 921(c) (1976 Supp.), provided:

If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in . . . the judicial district in which the injury occurred . . . .

One of the 1972 Amendments revised § 921 so that subsection (c), the counterpart of the previous subsection (b), now provides:

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court . . . a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted . . . to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings

. . . .

Certainly the deputy director was a party to pre-1972 litigation, but neither he nor his counterparts is expressly designated as a party by the 1972 Amendments. The legislative history is unenlightening as to the reason for this omission. While it is true that old § 921a<sup>1</sup> provided that the United States Attorney would represent the Secretary or the Deputy Commissioner in any court proceedings under old § 921, and that § 921a was continued by the 1972 Amendments although modified to permit the Secretary to appoint his own counsel,<sup>2</sup> the legislative his-

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<sup>1</sup> 33 U.S.C. § 921a, *as amended*, 33 U.S.C. § 921a (1976 Supp.):

In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal.

<sup>2</sup> 33 U.S.C. § 921a (1976 Supp.):

Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

tory is again unenlightening. To conclude from the mere existence of new § 921a that the Secretary, or his designee, the Director, is automatically a party to a review proceeding is to beg the question. This section's existence can as well mean only that if otherwise made a party, *e.g.*, by intervention in a review proceeding, the Secretary or Director will be represented by attorneys appointed by him.

Indeed, § 939(c)(1), added by the 1972 Amendments, suggests the latter reading. It provides that "[t]he Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim." It would be a redundancy for the Secretary to be authorized to provide legal services to a prevailing claimant if the Secretary himself was intended actively to litigate to sustain an award.<sup>3</sup> Thus, unlike the pre-1972 Act and numerous other laws providing for judicial review or orders of administrative agencies,<sup>4</sup> the LHWCA, as

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<sup>3</sup> We fail to understand how the Director's statutory duty to provide legal assistance to claimants confers upon him a stake in the proceedings independent of that of any claimant, as apparently urged by the dissent. The issue we confront is not whether the Director may appear before us as Adkins' representative, but whether the Director may participate in his own behalf.

We also note that we find nothing in the statute or its legislative history to indicate that the availability of legal assistance to claimants may be made to turn upon whether the Director agrees or disagrees with the decision which a claimant seeks to appeal, as the dissent appears to suggest, *infra*, slip opinion at 20 ("If he deems the decision erroneous, his statutory duty to assist the claimant includes seeking review.").

<sup>4</sup> Most other statutes providing for judicial review of agency action are simply not analogous to the LHWCA because under them true adversity exists between the claimant of a *government* benefit and the government agency which seeks to withhold it. Thus, when review of agency action is sought by an unsuccessful applicant for a license before the FCC, *see* 47 U.S.C. § 402, or an unsuccessful applicant for a rate increase before the FPC, *see* 16 U.S.C. § 825l(b), or an unsuccessful claimant for Supplemental

amended in 1972, does not on its face make the Director a respondent to a petition to review under § 921(c).

Since the Act is not specific, it follows that, if the Director is to be a party, he must be a "person adversely affected or aggrieved by a final order of the Board" within the meaning of § 921(c). Whether he is or is not is a question closely akin to the issue of whether the "case or controversy" requirement of Article III of the Constitution has been met.

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Security Income before the Secretary of H.E.W., *see* 42 U.S.C. §§ 405(b), 1383(c)(3), it is clear that the agency must be named a respondent since it is the party against whom relief is sought; the court could not grant an effective remedy without its presence. (Conversely, these agencies would never have reason to seek review of their own decisions.) In LHWCA cases, on the other hand, it is the private employer or insurance carrier which will have to pay any award which may be entered.

The Labor-Management Relations Act is more nearly similar to the LHWCA, since under it, as under the LHWCA, disputes are adjudicated between antagonistic private parties. And the NLRB may be called upon to defend its decisions in court. *See* 29 U.S.C. § 160(f). However, the NLRB's status as a party in the courts of appeals derives from its enforcement powers. *See id.* ("Upon the filing of such petition [for review], the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section [granting the Board power to enforce its decisions in court], and shall have the same jurisdiction . . . to make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board"). Thus, like the FCC, the FPC, the Secretary of H.E.W. and other agencies, the NLRB is an adverse party in court because adjudication is being sought of its right to grant relief in behalf of the prevailing party before it. The Director, Office of Workmen's Compensation Programs has no enforcement powers comparable to those of the NLRB.

Moreover, it is not the decision of the *Director* which is called into question by a petition for review under 33 U.S.C. § 921(c), but that of the Benefits Review Board. Thus, the Director does not possess even a concrete interest in defending his *own* decision in court, as does, for example, a district judge against whom a writ of mandamus is sought. As we noted in the majority panel opinion, the Benefits Review Board has specifically asked that it *not* be designated a party respondent in these proceedings. To that request, we acceded.

Generally, to be adversely affected or aggrieved under the statute or to present a case or controversy under the Constitution, one must have suffered "injury in fact, economic or otherwise." See K. Davis, *Administrative Law* (1970 Supp.) § 22.00-1 at 706; 3 *id.* § 22.02. Therefore, to be a party before this court, the Director must have some concrete stake in the outcome of the case.

The Director asserts he has the requisite stake because

[h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged as the designee of the Secretary of Labor.

The Secretary of Labor's administrative duties, delegated to the Director, see 20 C.F.R. § 701.202, are set out in 33 U.S.C. § 939. Subsection (c) (1) is most arguably relevant to the Director's stake in the Board's decisions:

The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

But we do not think that these duties provide the requisite stake. They do not confer upon the Director any specific interest in the proper administration of the Act.

In *United States ex rel. Chapman v. F.P.C.*, 191 F.2d 796, 799-800 (4 Cir. 1951), *rev'd*, 345 U.S. 153 (1953), we held that the Secretary of the Interior lacked standing to challenge an order granting a license to a private com-



pany to construct a dam. The Secretary claimed to be affected by the order because it was his statutory duty to market surplus electrical power from publicly constructed dams. The Supreme Court reversed without opinion on this point, upholding standing. 345 U.S. at 156. See 3 K. Davis, *supra*, § 22.15 at 280.

The Director asserts that *Chapman* supports his position before us, but we disagree. The Secretary of the Interior in *Chapman* did have some stake in the outcome: it would have been harder for him to market public power if another private dam was built. Alternatively, if the private project was disapproved, it would have been more likely that a public dam would eventually have been built, in which case the Secretary would have had more power to market. Thus, regardless of whether the Secretary was faced with a surplus or a shortage of electrical power to market under his statutory authority, the FPC's decision would directly affect him in the performance of his marketing obligations. The Director in this case has no such specific interest. Therefore, we read *Chapman* to suggest that the Director does not have a stake in the outcome and cannot be a party.

The lack of a stake in the outcome on the part of the Director would appear to end our inquiry. The Director argues, however, that because he is a party to proceedings before the Board, 20 C.F.R. § 801.2(10), it would be anomalous if he were not a party before this court. There are several answers to this argument. First, of course, that the Director is a party to proceedings before the Board does not alter the fact that he has no direct stake in the outcome of the case, is not a person aggrieved by Board action and is thus without a case or controversy to assert. Second, the fact that one is permitted to be a party to administrative proceedings does not require that one be entitled to initiate judicial review

of those proceedings:<sup>5</sup> in the former case, the participant may perform a useful role by calling to the administrative agency's attention considerations it could not on its own initiative, much in the way that an intervenor would in this court; in the latter situation, however, the hopeful party is seeking to initiate a new level of proceedings because of dissatisfaction with the result below. See 3 K. Davis, *supra*, § 22.08 at 242.

Finally, it would appear even from the regulations implementing the Act that the Director is not *automatically* to be a party in this court, even though he is automatically a party before the Board. In 20 C.F.R. § 801.2(10), "party" is defined as follows: "the Secretary or his designee *and* any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken." (Emphasis added.) However, 20 C.F.R. § 802.410 provides: "any *party* adversely affected or aggrieved by such decision [of the Board] may take an appeal to the U. S. Court of Appeals . . . ." (Emphasis added.) Thus, the Secretary is a "party" before the Board even if he is not "aggrieved"; but to be entitled to participate in court proceedings, the

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<sup>5</sup> While the Director here seeks to be named a *respondent* to a petition for review, a holding that he is a "person aggrieved" whose presence insures proper adversity would necessarily lead to the conclusion that he is entitled to petition for review of a decision of the Benefits Review Board of which he disapproves: if the Director has an interest in sustaining a Board decision with which he agrees, then he also has an interest in overturning a decision with which he disagrees. He would not readily subject the LHWCA to a construction under which the official charged with administering the Act could invoke the aid of the federal courts to reverse the decision of the board responsible for adjudicating claims under the Act. The unfairness of such a result is manifest if one contemplates the possibility that in some future case the Director, in furtherance of his asserted interest in determining "the proper scope of coverage of the Act," might seek to reverse an award to a claimant on the ground that the Board had been too generous.

Secretary, although a "party" below, must, like any other "party," be adversely affected.

In summary, we stand firm in our conclusion that the Director is not automatically a respondent in a review proceeding under § 921(c).

In our earlier opinion, we added that we did not decide that "a court of appeals may not, in a proper case, permit intervention by others [including the Director] who have an interest at stake . . . ." We elaborate on that comment: The Director unquestionably has a right to seek to intervene under Rule 24(b), Fed. R. Civ. P.,<sup>6</sup> and an application will ordinarily be granted. See 3B J. Moore, Federal Practice ¶ 24.10[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1912. The Director has not, however, sought intervention in these cases. We assume that he has not done so because he does not wish to render moot his assertion that such a request on his part is unnecessary. Having decided that such a request is necessary, we will still consider such a request on his part should he be advised to make it.

*Nos. 75-1051 and 75-1088—REVERSED.*

*Nos. 75-1075 and 75-1196—AFFIRMED.*

*Each Party to Pay His Own Costs.*

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<sup>6</sup> The Federal Rules of Civil Procedure principally govern procedure in the United States district courts in suits of a civil nature, Rule 1, but Rule 81(c) makes them applicable also to review proceedings under the Act to the extent that the Act does not prescribe procedure.

BUTZNER, Circuit Judge, dissenting:

I

I believe that the Director, Office of Workmen's Compensation Programs, should be recognized as a party to these proceedings. This issue raises a simple question of statutory construction. In 33 U.S.C. § 939(c), Congress authorized the Secretary of Labor to assist claimants and to provide them legal assistance. This statute must be read along with 33 U.S.C. § 921(a), which provides that attorneys appointed by the Secretary shall represent him before the courts of appeals. The Secretary has properly delegated his responsibilities to the Director.

Regulations under the Act establish the Director as a party before the Benefits Review Board. 20 C.F.R. § 801.3(10). His stake in the proceedings arises out of the duty imposed by 33 U.S.C. § 939(c)(1) to assist claimants. Thus, the Director, like any other party before the Board, is aggrieved within the meaning of 33 U.S.C. § 921(c) by an adverse decision of the Board. If he deems the decision erroneous, his statutory duty to assist the claimant includes seeking review. If the decision favors the claimant, the statute authorizes the Director to support the award on review.

In sum, the Act expressly places on the Secretary or his designee, the Director—not upon the courts of appeals—the responsibility of determining when the Director should participate in the review of the Board's orders. Congress did not condition the Director's appearance in our court on our granting or withholding permission.

The difference between the Director's status as a permissive intervenor and as a party is more than a technical nicety. The majority rule, as I see it, will create road-blocks to filing petitions for review and certiorari,

and it will provoke extended litigation over whether the Director's position in a given case satisfies the requirements of Rule 24(b). Other circuits have wisely recognized the Director's status as a party. *See, e.g.,* Pittston Stevedoring Corp. v. Dellaventura, No. 76-4042 (2d Cir. March 16, 1976); McCord v. Cephas, No. 74-1948 (D.C. Cir. March 25, 1975). I am not persuaded that we should differ from their sound conclusions.

## II

I fully agree with Judge Craven that the point of rest theory espoused by the majority of the court is a judicial gloss on the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, which is warranted by neither the Act nor its legislative history. *See* I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080, 1089 (4th Cir. 1975) (Craven, J., dissenting). I add only these brief observations. A careful study of the majority opinion filed when this case was heard by a panel, *I.T.O. Corp.*, 529 F.2d at 1081, discloses that the effect of the point of rest theory is to deprive longshoremen of coverage under the Act when they are injured while stuffing or stripping a ship's containers at a marine terminal. The slight modification of the theory in the majority's per curiam opinion alleviates some, but not all, of its harsh results. It does so, however, at the expense of adding the factor of lapse of time to the vague concept of place for determining the point of rest. Rational, uniform application of the court's theory to the myriad circumstances in which injuries occur will be most difficult.

Judge Craven initially voted with the majority to deny the Director standing as a party to these proceedings. On en banc reconsideration, he is now persuaded otherwise, and concurs in Judge Butzner's opinion.



## APPENDIX H

Effect of 1972 Amendments on Injuries Reported  
Under Longshore and Harbor Workers' Compensation Act  
Comparison of Old and Extended Coverage  
Fiscal Year 1975

District Office	Injuries Reported					
	Old Coverage <sup>1</sup>		Extended Coverage <sup>2</sup>		Coverage Undetermined <sup>3</sup>	
	Number	Percent of Total	Number	Percent of Total	Number	Percent of Total
Boston	20,580	47	21,946	51	836	2
New York	6,088	62	3,450	35	261	3
Philadelphia	1,529	27	4,087	72	33	1
Baltimore	2,988	26	8,379	74	21	*
Norfolk	4,147	31	9,042	69	20	*
Jacksonville	5,901	48	6,436	52	48	*
New Orleans	11,324	75	3,601	24	184	1
Houston	4,656	29	11,632	71	-	-
Cleveland	788	57	510	37	83	6
Chicago	817	52	704	46	26	2
San Francisco	8,409	77	2,459	23	36	*
Seattle	4,286	51	4,030	48	137	1
Honolulu	458	72	159	25	20	3
Total	71,971	48	76,435	51	1,705	1
					150,111	100

<sup>1</sup> Coverage in effect before 1972 Amendments—aboard vessel or over water.

<sup>2</sup> Shoreside coverage added by 1972 Amendments.

<sup>3</sup> Type of coverage (Old or Extended) unable to be determined.

\* Total injuries reported, including fatalities, from item 3 of form LS-3.

• Less than .50 percent.

Prepared by: Branch of Workers' Compensation Statistics—July 22, 1975

**Effect of 1972 Amendments on Injuries Reported  
Under Longshore and Harbor Workers' Compensation Act  
Comparison of Old and Extended Coverage  
Fiscal Year 1976**

Districts	Total <sup>1</sup>		Old Coverage <sup>2</sup>		Extended Coverage <sup>3</sup>		Coverage Undetermined <sup>4</sup>	
	Number	Percent of Total	Number	Percent of Total	Number	Percent of Total	Number	Percent of Total
Boston	46,506	41	19,117	58	26,961	58	428	1
New York	10,775	49	5,273	49	5,274	49	228	2
Philadelphia	6,650	35	2,320	35	4,298	65	32	*
Baltimore	12,356	21	2,557	21	9,799	79	0	-
Norfolk	18,330	27	4,880	27	13,359	73	91	*
Jacksonville	19,292	36	6,991	36	12,297	64	4	*
New Orleans	20,092	66	13,319	31	6,261	31	612	3
Houston	16,691	24	3,974	24	12,717	76	0	-
Cleveland	1,957	53	1,043	53	841	43	73	4
Chicago	2,860	37	1,052	37	1,796	63	12	*
San Francisco	12,017	71	8,598	71	3,358	28	61	1
Seattle	8,191	51	4,184	51	3,932	48	75	1
Honolulu	584	70	411	70	158	27	15	3
Total	176,301	42	73,719	42	101,051	57	1,531	1

<sup>1</sup> Total injuries reported, including fatalities, from item 3 of form LS-3.

<sup>2</sup> Coverage in effect before 1972 Amendments—aboard vessel or over water.

<sup>3</sup> Shoreside coverage added by 1972 Amendments.

<sup>4</sup> Type of coverage (Old or Extended) unable to be determined.

\* Less than .50 percent.

Prepared by: Br. of Workers' Compensation Statistics—August 1976



**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

Court, U. S.

FILED

NOV 12 1976

MICHAEL RODAK, JR., CLERK

**INTERNATIONAL TERMINAL OPERATING CO., INC., PETITIONER**

v.

**CARMELO BLUNDO and DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT  
OF LABOR**

**JOHN T. CLARK & SON OF BOSTON, INC. and  
AMERICAN MUTUAL LIABILITY INSURANCE CO., PETITIONERS**

v.

**JOHN A. STOCKMAN and DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT  
OF LABOR**

**ON PETITIONS FOR WRITS OF CERTIORARI TO  
THE UNITED STATES COURTS OF APPEALS FOR  
THE SECOND AND FIRST CIRCUITS**

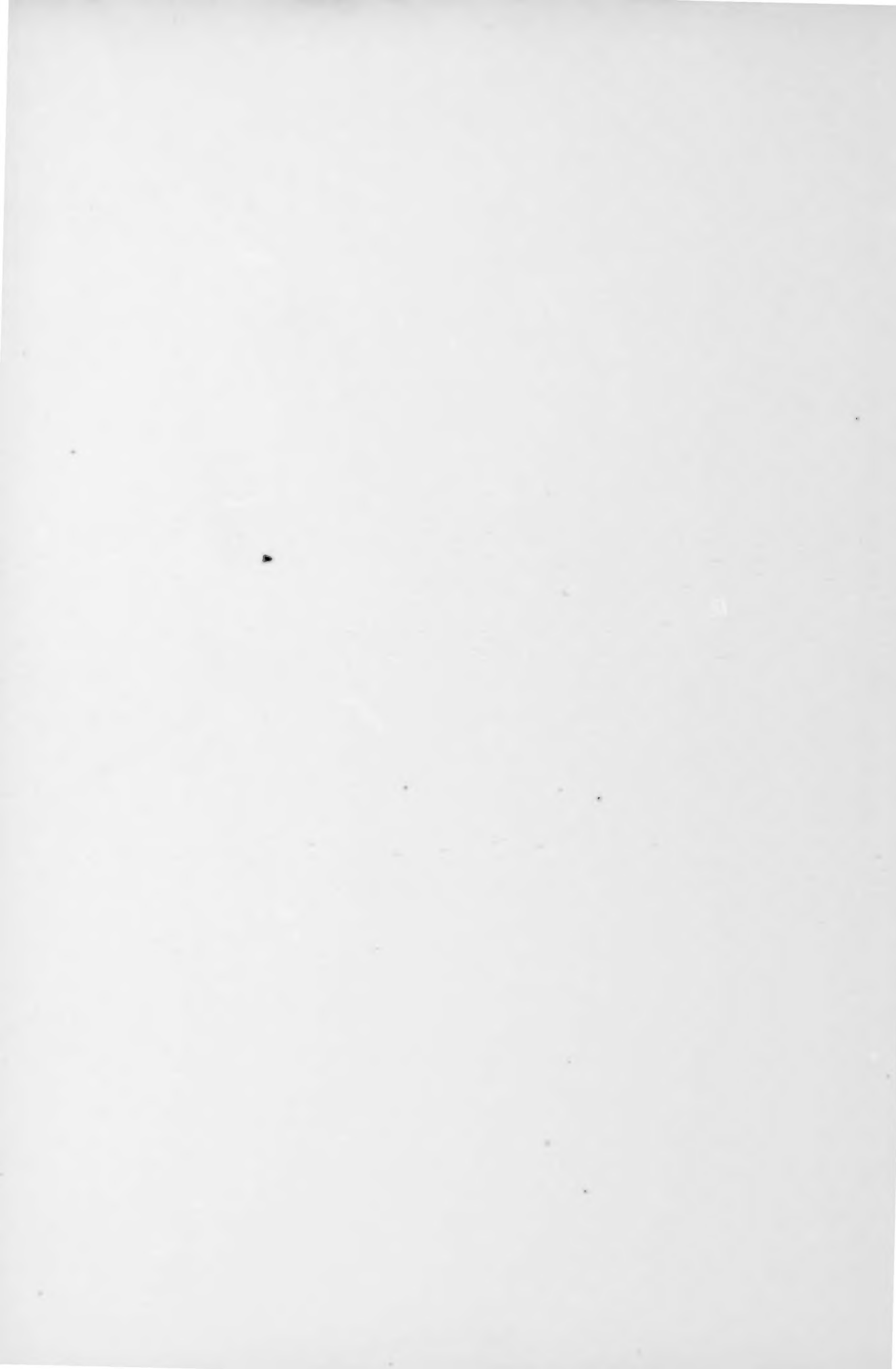
**MEMORANDUM FOR THE FEDERAL RESPONDENT**

**ROBERT H. BORK,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

**WILLIAM J. KILBERG,**  
*Solicitor of Labor,*

**LAURIE M. STREETER,**  
*Associate Solicitor,*

**GEORGE M. LILLY,**  
**JOSHUA T. GILLELAN, II,**  
**RONALD E. MEISBURG,**  
*Attorneys,*  
*Department of Labor,*  
*Washington, D.C. 20210.*





**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

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**No. 76-454**

**INTERNATIONAL TERMINAL OPERATING CO., INC., PETITIONER**

**v.**

**CARMELO BLUNDO and DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT  
OF LABOR**

---

**No. 76-571**

**JOHN T. CLARK & SON OF BOSTON, INC. and  
AMERICAN MUTUAL LIABILITY INSURANCE CO., PETITIONERS**

**v.**

**JOHN A. STOCKMAN and DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT  
OF LABOR**

---

***ON PETITIONS FOR WRITS OF CERTIORARI TO  
THE UNITED STATES COURTS OF APPEALS FOR  
THE SECOND AND FIRST CIRCUITS***

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**MEMORANDUM FOR THE FEDERAL RESPONDENT**

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Each of these cases presents the question whether persons who work in a terminal building with cargo that has been discharged from a vessel are covered by the Longshoremen's and Harbor Workers' Compensation

Act, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3) and 903(a). In No. 76-454 the employee was working as a "checker," a person who breaks the seal on a container of goods, checks the contents against the ship's manifest, and marks each item as "stripped." In No. 76-571 the employee was a "stripper," a person who removes the cargo from a container in preparation for transfer to overland carriage. In each case the court of appeals held that all employees engaged in such employment within the terminal are covered by the Act, whether or not they personally remove the cargo from the vessel and whether or not the cargo reaches its first point of rest before they began working with it.

We have argued that this Court should grant the petition in No. 76-444, *Northeast Marine Terminal Co. v. Caputo*, so that it can resolve the conflict among the circuits concerning the scope of shoreside coverage of the amended Act.<sup>1</sup> The employment activity at issue in *Caputo* was more remote from the unloading of a vessel than was the employment in these two cases. If the Court should grant review in *Caputo* and affirm the judgment in that case, the correctness of the judgments in the instant cases would follow *a fortiori*. If, on the other hand, the Court should conclude that the activity in *Caputo* was not covered by the amended Act, its rationale might well indicate the proper disposition of these two cases and others like them. If it should not, the Court then could grant review in one of these cases to reach the questions presented here.

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<sup>1</sup>A copy of our memorandum in *Caputo* is being furnished to counsel for the parties in these cases.

We therefore believe that consideration of these petitions should be deferred pending this Court's disposition of *Caputo*.<sup>2</sup>

Respectfully submitted.

ROBERT H. BORK,  
*Solicitor General.*

WILLIAM J. KILBERG,  
*Solicitor of Labor,*

LAURIE M. STREETER,  
*Associate Solicitor,*

GEORGE M. LILLY,  
JOSHUA T. GILLELAN, II,  
RONALD E. MEISBURG  
*Attorneys,*  
*Department of Labor.*

NOVEMBER 1976.

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<sup>2</sup>If the Court denies review in *Caputo*, then it should deny review in these cases as well. Although there is a square conflict among the circuits concerning coverage of the activity at issue in *Caputo*, there is not yet a conflict in result (although there may be a conflict in rationales) concerning coverage of terminal workers such as "checkers," "stuffers," and "strippers." The Fourth Circuit has divided three-to-three on the question. *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 529 F. 2d 1080, adhered to *en banc*, 75-1051, decided August 26, 1976. *Weyerhaeuser Co. v. Gilmore*, 528 F. 2d 957 (C.A. 9), certiorari denied, October 4, 1976 (No. 75-1620), to which petitioners refer, does not create a conflict concerning coverage of terminal activity. *Gilmore* involved an employment injury on the water and presented no question with respect to the Act's coverage ashore. The Ninth Circuit has not yet spoken on the Act's shoreside coverage; the first case involving such a question to reach that court, *Brady-Hamilton Stevedore Co. v. Herron*, No. 75-1538, was argued on October 13, 1976.

IN THE  
**Supreme Court of the United States**  
October Term, 1976

JAN 21 1977

RODAR, JR., CLERK

No. 76-454

**INTERNATIONAL TERMINAL OPERATING CO., INC.,**  
*Petitioner,*

v.

**CARMELO BLUNDO**

AND

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,**  
**UNITED STATES DEPARTMENT OF LABOR,**  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

**BRIEF FOR THE PETITIONER**

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IN THE  
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OCTOBER TERM, 1976

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v.

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AND

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UNITED STATES DEPARTMENT OF LABOR,  
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On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

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BRIEF FOR THE PETITIONER

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OPINIONS BELOW

This matter arises under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The Decision and Order of the Administrative Law Judge, and the Order amending the Previously Issued Decision and Order, were entered on March 3, 1975, and April 18,

1975, respectively, and appear at pages 49a and 60a as Appendices C and D to the Petition. (All page citations to the Appendices to the Petition are hereinafter preceded by the designation "Pet. A.") The Decision of the Benefits Review Board of the Department of Labor affirming the Decision and Order of the Administrative Law Judge and dated October 30, 1975, appears as Appendix B to the Petition (Pet. A. 45a). The majority and dissenting opinions and judgment of the Second Circuit Court of Appeals, decided July 1, 1976, affirming the Decision of the Benefits Review Board, have not been officially reported but are printed as Appendix A to the Petition. (Pet. A. 1a).

### JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on July 1, 1976 (Pet. A. 1a). The Petition for a Writ of Certiorari was filed on September 28, 1976, and was granted on December 6, 1976. This case has been consolidated for review with *Northeast Marine Terminal Co. et al. v. Caputo et al.*, No. 76-444, as to which the Petition for a Writ of Certiorari was also granted on December 6, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

### QUESTIONS PRESENTED

1. Whether the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act were intended to extend federal compensation coverage to new categories of persons not directly involved in the activity of unloading cargo from a vessel to an adjacent pier or similar facility.

2. Whether the 1972 amendments to such Act were intended to extend coverage to a "stripper" of containers who was not employed by the unloader of the vessel, who was located at the time of injury in a building sub-

stantially removed from the unloading area and never used for loading or unloading of vessels, and whose sole duty at the time of the injury was to break down the container for storage and Customs inspection—particularly where a substantial period of time had passed since the container had been unloaded at some other location.

3. Whether the situs of the accident in this case and the status of the injured employee were such as to meet the requirements of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

### STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3) :

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4) :

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 33 U.S.C. § 903(a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). \* \* \*

#### STATEMENT

Petitioner International Terminal Operating Company ("ITO") conducts two distinct types of operations in the New York area. One is stevedoring—the loading or unloading of cargo from ships. That operation by ITO is not involved in this case. The other activity is as a terminal operator, including, under contract with other companies, the consolidation or breaking down of cargo which has been or will be shipped on the lines of other carriers. That is the activity involved here.

On January 8, 1974, one of ITO's employees, respondent Blundo, was injured while working as a "checker" in a warehouse at a pier at 19th Street in Brooklyn (A. 63-64, 68-70).<sup>1</sup> The area where he was working was a large one. The pier runs approximately 1000 feet from 19th to 21st Streets and extends approximately 700 feet from the foot of these streets to the seaward edge of the area (A. 62-63).<sup>2</sup> Cargo is loaded and unloaded from vessels at the seaward edge of the 21st Street pier, but never at the 19th Street pier (A. 63-64, 75-76, 95-96; Pet. A. 31a n.19). Nor was the cargo involved in this case unloaded at either the 19th or 21st Street piers.

<sup>1</sup> The designation "A." refers to the consolidated Appendix filed herein and in No. 76-444.

<sup>2</sup> The area is fenced and has two gates (A. 61).

Instead, sometime prior to Mr. Blundo's accident, the particular container at issue<sup>3</sup> had been unloaded from some ship at some destination quite distant from the 19th Street pier. Although no one involved in the accident knew how long ago the container had been unloaded, there was testimony that it could take a week or considerably longer for such containers to reach the 19th Street pier after being unloaded in other sections of New York (A. 81-83, 86-87, 96). No one involved in the accident knew the name of the ship which had carried the container or which company had unloaded it (A. 81, 96). It is clear, however, that the unloader had not been ITO (A. 71, 76, 77, 85-86, 95-96, 104-05).

After the container had been unloaded, it had been carried with other cargo over the public streets to the 19th Street pier by a common carrier trucking company, driven by Teamsters Union members (A. 76-77, 95-96). Sometimes, after delivery at 19th Street, cargo is picked up directly by the consignee, using his own trucks (A. 97-98). In this instance, however, since duty was owed on this particular container, it had to be "stripped," or broken down, and sent to a bonded warehouse located on the pier for passage by Customs officials before being picked up by the consignee or consignees (A. 69, 107-08, 110, 122). This stripping was being performed by ITO under contract with American Export Lines, Inc., which owned the container (A. 65, 76, 85-86, 120-21).

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<sup>3</sup> A container is a large metal box into which smaller crates, boxes, bags, barrels or other such packages are consolidated for shipment to a single destination, even though the various contents may be meant for multiple consignees. Ordinarily containers are shipped on vessels specifically designed for carrying containers, and loaded or unloaded at special container facilities. After being taken off a vessel by crane, a container is placed on a truck chassis and thereby conveyed to a trailer which may be thereafter transported within the unloading terminal or over public streets to a consignee or warehouse.



As a "checker," Mr. Blundo's job on the day of his injury<sup>4</sup> was to break the seal around the container, check the contents against his manifest sheet (which showed a description of the cargo, the consignee, etc.), and to mark each item as "stripped" (A. 86-89). These duties are performed in a building used exclusively for storage and stripping and not in an area used for the loading or unloading of ships (A. 85-86, 94-95; Pet. A. 31a n.19). After the checking, the cargo is then placed on pallets and sent to the bonded warehouse until cleared by Customs and picked up by the consignee or consignees (A. 88, 98). It was while Mr. Blundo was engaged in the checking process in the warehouse that he slipped on some ice and was injured (A. 74).

Under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, employees who are not covered by the Act are paid under state workmen's compensation laws. In order for an employee to be covered by the federal statute, several criteria must be met. Thus, the employee must meet the "status" test as someone engaged in maritime employment, as defined in Section 2(3), and the injury must meet the "situs" test as having occurred upon navigable waters, as defined in Section 3(a).<sup>5</sup>

The Administrative Law Judge and the Benefits Review Board, both of the Department of Labor, held that Mr. Blundo was engaged in maritime employment at the time of his injury and was thus an "employee" as defined by the Act, and that the place of the injury was "upon the navigable waters of the United States" as

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<sup>4</sup> Blundo testified that on other occasions he spent as much as 20% of his time performing on-vessel checking duties (A. 67-68).

<sup>5</sup> The employer must also meet the test set forth in Section 2(4). However, in this case, petitioner has never questioned that it was an "employer" under the Act, since some of its other employees were engaged in longshoring operations (See Pet. A. 54a).

that term is defined in the 1972 amendments to the Act (Pet. A. 57a, 46a).

These findings were made despite the facts, as set forth above, that:

- (a) ITO did not unload the ship.
- (b) The unloading was done in an area substantially removed from the scene of the accident.
- (c) The container at issue was subsequently carried over the city streets by common carrier.
- (d) It might have been a week or longer before the container reached the 19th Street pier after being unloaded from its vessel.
- (e) The container was not owned by ITO.
- (f) The container was "stripped" in a building not used for loading or unloading ships.
- (g) ITO does not load or unload ships at the 19th Street pier.
- (h) The injured party's sole duties revolved about checking the contents of the container.
- (i) The only step that remained was for the cargo to be passed by Customs officials and picked up by a consignee or consignees.

The Second Circuit split two to one in regard to respondent Blundo. Judges Friendly and Oakes held that Blundo's injury met the "situs" test of the 1972 amendments (Pet. A. 30a n. 19), and that he was covered by the Act because he had stripped the container prior to the point where the consignee had begun its movement from the pier (Pet. A. 39a).

Judge Lumbard dissented as to Blundo. He would have held that the 1972 amendments were meant to extend only to those employees engaged in loading or unloading activities between the vessel and the first point

of rest if the cargo is being unloaded from the vessel, or the last point of rest if the cargo is being loaded aboard the vessel (Pet. A. 42a-43a).

Faced with similar factual situations raising the issue of the new extent of coverage under the 1972 amendments to the Act, other Courts of Appeals have arrived at dissimilar legal solutions.<sup>6</sup> The opinions of these Courts of Appeals and of individual judges thereof are summarized and discussed in some detail in the Petitions for Writs of Certiorari filed herein (pp. 8-24) and in *John T. Clark & Son v. Stockman*, *supra* (pp. 7-12).

### SUMMARY OF ARGUMENT

The 1972 coverage amendments to the Act substantially broadened the Act's reach by including, in addition to those longshoremen actually working aboard ship, all other members of the longshore loading or unloading gang and other employees directly involved in the loading or unloading function. In enacting the 1972 coverage amendments, however, Congress did not intend to cover whole new categories of persons engaged in activities not formerly covered, even in part, by the pre-1972 Act. Specifically, Congress did not intend to include all of the large numbers of persons at United States ports who participate in waterfront freight-handling up to and including the point of delivery to the consignee.

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<sup>6</sup> See *Stockman v. John T. Clark & Son*, 539 F.2d 264 (1st Cir. 1976) (Pet. A. 62a), *petition for cert. filed Oct. 22, 1976*, (No. 76-571); *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976) (Pet. A. 90a); *I.T.O. Corp. v. Benefits Review Board*, 529 F.2d 1080 (4th Cir. 1975), *on rehearing in banc*, — F.2d — (August 26, 1976) (Pet. A. 113a), *petition for cert. filed sub nom. Maritime Terminals, Inc. v. Brown*, Nov. 19, 1976 (No. 76-706) and *Adkins v. I.T.O. Corp.*, Nov. 24, 1976 (No. 76-730); *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *petition for cert. filed sub nom. Pfeiffer v. Ford*, 45 U.S.L.W. 3391, Nov. 10, 1976 (No. 76-641); *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3254 (Oct. 5, 1976).

The Act, the legislative history of the 1972 coverage amendments, consistent industry practice, and consistent judicial and other official definitions of the longshoring function all point to the conclusion that the "maritime employment" of longshoremen is the stevedoring activity of the longshore gang (and those directly involved with the gang) which, in the case of unloading, takes cargo out of the hold of a vessel, moves it away from the ship's side, and carries it to its point of rest on the pier or in a terminal shed. It is at this point of rest that the stevedoring function ends and the terminal operation or warehousing function begins.

Respondent Blundo's activity at the time of his injury was in conjunction with terminal operation, and would not have been covered even in part by the pre-1972 Act. Blundo was not a longshoreman or a member of a longshore gang, and did not take part in the unloading of the cargo from the vessel. The unloading was done by a longshore gang employed by another stevedoring firm not Blundo's employer, and was completed at a time and place far removed from the time and place of Blundo's injury. In fact, Blundo's injury occurred at a pier which was never used for loading or unloading vessels and which therefore did not meet the "situs" requirement of the Act.

The interpretation of the Act advanced herein accurately identifies the employment activity or function which Congress intended to reach through the 1972 coverage amendments. Moreover, this interpretation is consistent with those principles of certainty and geographical uniformity of application which have been important considerations in the construction of the Act since it was first enacted in 1927. The concept of "loading" and "unloading" described herein is familiar not only to employees and employers in the industry, but also to federal courts which will ultimately be responsible for implementing this Court's definition of coverage.

By contrast, the Department of Labor's expansive interpretation of coverage under the amended Act leads to arbitrary and anomalous results in particular cases which Congress could not have intended when it enacted the 1972 amendments. Moreover, in view of the legislative history of the 1972 amendments, Congress cannot be presumed to have approved an extension of coverage which would have led to such huge increases in compensation insurance costs within the stevedore and marine terminal industry, and such severe economic effects on harbor operations, as have in fact occurred.

## ARGUMENT

### I. *Blund* was not a covered "employee" under the Act.

#### A. *The 1972 amendments to the Act did not extend coverage to new categories of employees not directly involved in the loading or unloading of vessels.*

Until 1972, coverage under the Act was determined largely by the "situs" of the injury and the "status" of the injured person's employer. If the employer was a "maritime" employer (*i.e.*, if he had any employees engaged in "maritime employment"), and if the injury occurred on the navigable waters of the United States, then the injury was covered unless the injured person came under one of the specific exclusions of the Act.<sup>7</sup>

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<sup>7</sup> The relevant provisions of the Act before the 1972 amendments were as follows:

Section 2(3), 44 Stat. 1424, 33 U.S.C. § 902(3):

The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 44 Stat. 1424, 33 U.S.C. § 902(4):

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in



The employment "status" or function of the injured persons was irrelevant to the coverage issue, except that "a master or member of a crew of any vessel, [and] any person engaged by the master to load or unload or repair any small vessel under eighteen tons net," were expressly excluded from the definition of "employee" in Section 2(3).

Until 1972, the strict situs orientation of the Act resulted in the extension of only partial coverage to certain occupations which, although unquestionably maritime in nature, were amphibious in operation. Foremost among such occupations was that of the longshoreman engaged in loading or unloading a vessel, an activity which typically requires movement back and forth repeatedly across the jurisdictional line which separated the shore from navigable waters.

The 1972 amendments to the Act modified the tests for coverage in two respects. First, the "situs" provision was expanded to cover injuries incurred in certain shoreside areas as well as on navigable waters.<sup>8</sup> Second, the definition of a covered employee was amended to add an express "status" requirement. Under the Act as amended, a person injured at or on a covered situs must also, in order to be eligible for compensation, show that he is a person engaged in maritime employment, *i.e.*, that he is a "longshoreman or other person engaged in longshoring

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part, upon the navigable waters of the United States (including any dry dock).

Section 3(a), 44 Stat. 1426, 33 U.S.C. § 903(a) :

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) \* \* \*.

<sup>8</sup> The new Section 3(a) enlarged the term "navigable waters" to include "any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."

operations.”<sup>9</sup> Blundo was injured over one year after the effective date of the 1972 amendments. Thus, the first issue in this case is whether Blundo was engaged in “maritime employment” at the time of his injury.

Two basic principles, each plainly reflected in the legislative history of the 1972 amendments, govern the resolution of this issue. First, in enacting the 1972 amendments Congress did not intend to extend the coverage of the Act to new categories of employment not previously covered. Second, the occupational function to which Congress intended to extend full federal coverage through the 1972 amendments was the function of loading or unloading cargo from vessels.

1. *The 1972 amendments did not extend coverage to new categories of “maritime employment.”*

The anomaly which Congress sought to correct through the 1972 amendments to the Act’s coverage provisions is illustrated by the result reached in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). In that case longshoremen engaged in loading a vessel were held to be outside the coverage of the Act because their injuries occurred ashore. The effect of this holding was to subject the “amphibious” longshoreman<sup>10</sup> to a dual existence for compensation purposes, with the water’s edge serving as a sharp dividing line between state benefits ashore and federal benefits aboard ship. A typical longshore loading or unloading gang, the members of which crossed that dividing line perhaps dozens of times a day in the course of taking cargo on or off a vessel, was subject to a continuously shifting mix of federal and state cover-

<sup>9</sup> Section 902(3). The “status” requirement also embraces categories of “harborworker[s]” not relevant to this case, i.e., “\* \* \* a ship repairman, shipbuilder, and shipbreaker \* \* \*.”

<sup>10</sup> The “amphibious nature of the longshoreman’s occupation” was recognized in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 213 (1971).

age, depending solely on the seemingly unimportant and fortuitous circumstance of where the various gang members were standing at a given point in time.

An analogous result was reached in *Victory Carriers, Inc. v. Law, supra*, which set definite limits on the ability of longshoremen injured ashore by pier-based equipment to pursue the federal "seaworthiness" remedy against the owner of a vessel being loaded or unloaded. Although *Victory Carriers* did not involve the workmen's compensation provisions of the Act, this Court's decision in the case was similar in effect to the decision in *Nacirema*, since both decisions confined federal jurisdiction to injuries incurred on navigable waters, except where, in the "seaworthiness" case, the injury was caused by an appurtenance of a vessel. Taken together, these two decisions had the practical effect of making state workmen's compensation laws the exclusive remedy for longshore injuries incurred ashore. On navigable waters, however, the longshoreman's remedies remained exclusively federal.

The complexity and uncertainty in this situation were naturally matters of concern to representatives of the longshoremen. Testifying before the House Select Subcommittee on Labor in July of 1972, Mr. Joseph Leonard, Safety Director of the International Longshoremen's Association ("ILA"), stated:

What do we do, cut ourselves in half? Certain laws will give no compensation, which is a ridiculous situation. Federal laws cover the longshoreman if he falls from the ship into the water, but no Federal compensation if he falls from the dock into the water.

Federal compensation law stops at the gangplank to the pier. When you come off the gangplank you come under a different law; you come under the State. Thirty-six States cover these docks and may be more now with the inland waterways. [*Long-*

*shoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 297 (1972) hereinafter "House Hearings").]*

The anomaly identified and described by Mr. Leonard would have been greatly exacerbated by provisions of the 1972 amendments implementing substantial increases in federal benefits for covered injuries. The Committee Reports recognize this point:

It is apparent that if the Federal benefit structure embodied in the Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred. [*H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972).*]

It is significant, however, that at no point in the legislative history of the 1972 amendments is there any suggestion that Congress intended to enact, or was even asked to enact, a solution to any other coverage problem than that of the longshoreman or longshore gang "cut in half" by an artificial coverage line drawn at the water's edge.

In the absence of any contrary language in the Act, or any contrary indication in the legislative history, the 1972 coverage amendments should not be construed to expand the federal longshore compensation system to include categories of persons other than the longshore loading and unloading gang which was the focus of both the *Nacirema* and *Victory Carriers* decisions.<sup>11</sup> As will be

<sup>11</sup> Where there is doubt about how inclusively a statute should be construed to apply, if the mischief that it was enacted to remedy can be perceived it will be construed to apply only so far as

shown below, the extension of coverage from shipboard longshoremen to all members of the longshore gang brought a substantial number of new employees under the coverage of the Act.<sup>12</sup> If Congress had any intention to expand the Act still further to include all of the wide variety of persons whose occupations happen to bring them to the waterfront, it may be presumed that Congress would have expressed that intention by some language in the Act or, at a minimum, by some indication in the legislative history of the 1972 coverage amendments. Specifically, in the absence of any such indication and in the context of the problem which Congress was addressing when it enacted the 1972 amendments, it cannot be concluded that Congress meant to cover all of the large numbers of persons who participate in waterfront freight-handling up to and including the point of delivery to the consignee (in the case of import cargo) or receipt from the consignee (in the case of export cargo).

The issue then becomes one of determining the point, in the wide range of activities which take place between the ship and the consignee, at which Congress meant to draw the coverage line. As will be shown below, the

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needed in order to effectuate the remedy. 2A Sutherland, Statutory Construction, § 54.04 (4th ed. 1973).

See *United States v. Champlin Refining Co.*, 341 U.S. 290 (1951) (statute cannot be divorced from circumstances existing at the time it was enacted and from the evil which Congress sought to correct and prevent); *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544 (5th Cir. 1959) (an accepted canon of construction is to look to the evil to be remedied).

<sup>12</sup> A representative of the International Longshoremen's Association testified to the House Committee that in the process of loading or unloading a container ship only four longshoremen in the gang would actually be aboard ship during the loading or unloading operation. See p. 19, *infra*. The 1972 amendments expanded coverage from these four to the entire twenty-three member gang.



only coverage line which is consistent with the Act, its legislative history, and commonly accepted definitions of longshoring operations (both in the industry and in prior judicial decisions) is the line which defines the activity of loading and unloading cargo from a vessel. Any other line produces anomalous or arbitrary results of the very kind which the 1972 amendments were enacted to prevent.

Thus, the 1972 amendments cannot be construed to extend coverage to persons, such as Blundo, who are injured while engaged in activities far removed, in terms of time, place, and function, from the longshore activity of taking cargo on or off a vessel. The Committee Reports could hardly have stated the intent of Congress on this point more plainly:

The intent of the Committee is to permit a uniform compensation system to apply to employees *who would otherwise be covered by this Act for part of their activity*. [H.R. Rep. No. 1441, *supra* at 10-11; S. Rep. No. 1125, *supra* at 13; emphasis added.]

Employees not engaged in an activity, such as loading or unloading, which requires them to go aboard ship would not "otherwise be covered for part of their activity" because no part of their activity is upon navigable waters. By its terms, therefore, this statement of Congressional intent limits the effect of the 1972 coverage amendments to those employees engaged in activity carried out in whole or in part upon navigable waters, and excludes coverage of terminal or warehouse employees whose duties do not at any time require them to go aboard ship.

As expressed in the legislative history of the 1972 amendments, the "status" test is not satisfied merely by a showing that the injured worker has from time to time in the past satisfied the Act's former "situs" test by working on navigable waters. As will be shown later in this brief, an injured worker's former activities are

irrelevant to his "status" under Section 2(3).<sup>13</sup> Instead, the test is whether at the time of injury the worker in question was taking part in "activity" (i.e., loading/unloading, shipbuilding, ship repair, etc.) which was being carried out in whole or in part over navigable waters. This test would extend coverage to any member of a longshore gang which is engaged in loading or unloading a vessel, whether or not the particular gang member's injury occurs aboard ship, and whether or not that gang member's duties require him to go aboard ship. The test would deny coverage, however, to warehouse or terminal workers engaged in cargo-handling activity long after the unloading has been completed and the vessel has sailed. No "part" of such activity would "otherwise be covered" under the Act; therefore, it would be contrary to Congressional intent to extend coverage to the whole activity even when it happens to occur at a covered situs.

Congress' emphasis on the injured worker's activity, as contrasted with his particular location (land or water) during the activity, is illustrated by two examples which appear in the Committee Reports. The first is a reference to modern cargo-handling techniques which have reduced the number of members in any given longshore gang who are required to remain aboard ship during the loading or unloading process:

It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore. [*H.R. Rep. No. 1441, supra* at 10; *S. Rep. No. 1125, supra* at 13.]

The point of this reference is that, as fewer members of the typical longshore gang are required to go aboard ship, fewer would be covered under the pre-1972 situs

<sup>13</sup> See pp. 60-64 *infra*.

test. The typical general cargo or break-bulk<sup>14</sup> gang in New York, for example, places a minimum of eight of its twenty members physically aboard the ship as "holdmen" to make up drafts or perform other functions necessary in a break-bulk operation. In addition, other members of the gang, such as the ship's crane or winch operators, may also work aboard ship in a break-bulk operation.<sup>15</sup> By contrast, the standard *container* gang in New York consists of twenty-three men, only four to six of whom are "holdmen" required to remain aboard ship. The rest of the gang, including yard hustler drivers, crane operators, gangway men, and dock workers, remain on the shore during the loading or unloading operation. Those on the pier do not stuff or strip containers<sup>16</sup> (a terminal employee function) but take part in the uninterrupted process of moving the loaded containers between the container marshalling yard (point of rest) and the ship. Those members of the standard container gang who remain ashore are no less gang members, and no less directly involved in the loading or unloading process, than their counterparts in the typical break-bulk gang.

<sup>14</sup> Break-bulk cargo is composed of items of varying size and form, which must be handled separately and individually stored in the wings of the hold, as opposed to dry-bulk cargo, such as wheat, and liquid-bulk cargo such as oil, both of which are simply poured into the hold. [Goldberg, *Containerization as a Force for Change on the Waterfront*, 91 Monthly L. Rev. 8 at n. 7 (1968).]

<sup>15</sup> See New York Collective Bargaining Agreement, Part X:

Size of Gangs and Working Rules. 1. (a) Minimum number of men in gang when loading or discharging general cargo shall be 20 men, not less than 8 holdmen and the balance of the gang to be distributed between the hold, deck and dock at the discretion of the employer.

This agreement is a public document on file with the Department of Labor, Bureau of Labor Statistics, Office of Wage and Industrial Relations, Division of Industrial Relations (File No. 5423).

<sup>16</sup> "Stuffing" is the process of placing cargo in a container for export; "stripping" is the process of taking cargo out of a container which has been unloaded from a vessel.

It is fully consistent with the 1972 amendments, therefore, to extend coverage to all container gang members directly engaged in the loading/unloading process, regardless of their particular functions in the gang.

The shrinking proportion of longshore gang members covered by the old situs requirement was a problem specifically pointed out to the House Committee by Mr. Leonard of the ILA in connection with his discussion of coverage problems under the old Act:

When they talk about more men working on the ships, we will debate this any day of the week, because on a container ship, which is over 50 percent of our work today, we have four men on the ship at each hatch. We have two hatches. The rest of the men are out on the dock driving trucks or moving around in the area or on the overhead crane. [*House Hearings, supra* at 299.]<sup>17</sup>

A second illustration of the amended coverage tests which appears in the Committee Reports is the reference to coverage of checkers:

However, checkers, for example, *who are directly involved in the loading or unloading functions* are covered by the new amendment. [*H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13; emphasis added.]

This reference is of particular importance to this case because Blundo was employed by ITO as a checker during his five years of employment prior to the accident (A. 63); but was *not* "involved in the loading or unloading function" at the time of his injury. In industry practice and parlance, a checker is not considered a longshoreman, nor is he normally part of the longshore gang hired

<sup>17</sup> It should be noted that Mr. Leonard was apparently referring to two separate gangs of about 23 men each, only 4 of whom in each gang work in the hold.

to load or unload a vessel.<sup>18</sup> Nevertheless, he may be assigned to work directly with the gang in the loading or unloading function, checking cargo as it moves from vessel to the point of rest on the pier (or vice versa in the loading process). The coverage test applicable to checkers again reflects the intent of Congress to make coverage dependent on the practical fact of the injured worker's participation in the loading or unloading activity, rather than on his own physical activity or location. The other side of this statement, of course, is that checkers (such as Blundo) who are *not* "directly involved in the loading or unloading functions" are not covered by the Act.

2. *In the case of longshoremen and other persons engaged in longshoring operations, "maritime employment" is the process of loading or unloading vessels.*

As discussed above, Congress was clearly determined to eliminate or reduce the importance of the "fortuitous circumstance" of situs as a determinant of federal compensation coverages.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the *fortuitous circumstance* of whether the injury occurred on land or over water. [*H.R. Rep. No. 1441, supra* at 10; *S. Rep. No. 1125, supra* at 13; emphasis added.]

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<sup>18</sup> See L. Rubin and W. Swift, "The Negro in the Longshore Industry" in *Negro Employment in the Maritime Industries*, Vol. VII—Studies of Negro Employment (The Wharton School, University of Pennsylvania, 1974) (hereinafter cited as "Rubin and Swift") at 10: "[C]heckers, who are not part of the regular longshore gang, are assigned to check and record the cargo being loaded or unloaded." The intent of Congress to cover checkers directly involved in loading or unloading as well as those workers normally considered longshoremen accounts for the phrase, "longshoremen or others engaged in longshoring operations," (i.e., loading and unloading ships) in the Section 2(3) definition of "employee".



\* \* \* even if an employee does not *happen to be* over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it. [118 Cong. Rec. 36385 (1972) (Rep. Steiger); emphasis added.]

It is important to recognize, however, that in expanding the situs requirement Congress had no thought of enlarging the scope of "maritime employment" to which the Act applied.<sup>10</sup> The circumstance of situs was in Congress' view "fortuitous" only insofar as it artificially "cut in half" the loading/unloading function which Congress saw as the real subject matter of the Act. The liberalization of "situs" may not therefore be construed in such a manner as to vitiate the "status" requirement which Congress so deliberately fashioned:

The Committee does not intend to cover employees who are not engaged in *loading, unloading, repairing or building* a vessel, just because they are injured in an area adjoining navigable waters used for such activity. [*H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13; emphasis added.]

The Committees' examples of covered and non-covered employment confirm the general rule stated above, that the "maritime employment" of longshoremen (and others engaged in longshoring operations) is the loading and unloading of vessels alongside a pier:

[Longshore gang:]

To take a typical example, cargo, whether in break bulk or containerized form, is typically *unloaded*

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<sup>10</sup> At least one Court of Appeals has held that the "maritime employment" requirement of Section 2(3) narrowed the scope of coverage even on navigable waters, excluding certain categories of workers who were covered under the Act before 1972. *Weyerhaeuser v. Gilmore, supra*. It is not necessary to reach this issue in this case because Blundo's injury did not occur on navigable waters and would therefore not have been covered under the prior Act.

from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. [*H. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13; emphasis added.]

[Terminal labor; clerical employees:]

Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would *not* be covered, nor would purely clerical employees whose jobs do not require them to participate in the *loading or unloading* of cargo. [*Id.*; emphasis added.]

[Checkers:]

However, checkers, for example, who are directly involved in the *loading or unloading* functions are covered by the new amendment. [*Id.*; emphasis added.]

As applied to Blundo, a checker, the test of coverage is whether at the time of his injury he was "directly involved in the loading or unloading functions." The "loading or unloading functions" referred to by the Committee refer to that activity formerly covered in part by the Act, namely, the activity of a longshore gang moving cargo between a vessel and a point of rest on the shore. As will be explained more fully below, Blundo was not a member of the longshore gang which unloaded the container in question from the container vessel, and he took no part in the unloading process. Therefore, he did not meet the "status" test of Section 2(3) at the time of his injury and was not covered by the Act.

- B. *At the time of his injury Blundo was involved not in the stevedoring function of loading or unloading a vessel, but in the terminal operation function of stripping a container.***

In order to appreciate Blundo's employment status at the time of his injury, it is necessary to understand in some detail both the structure of work on the waterfront and the physical process of loading and unloading ships. Although longshore practices vary somewhat from port to port, the interplay of common economic and technological factors, strong longshore labor unions, and the unifying influence of federal maritime jurisdiction, has resulted in a substantial uniformity within the stevedore and marine terminal industries at United States ports. This uniformity makes it possible to make certain general observations regarding the industry which are essential to an understanding of the 1972 amendments to the Act.

1. *The stevedoring function and the marine terminal operation function are separate and distinct waterfront activities.*

An accurate and concise distinction between the stevedoring and marine terminal operation functions appears in a recent report of the Department of Labor relative to the Office of Workers' Compensation Programs:

The marine terminal operator, who may own or lease the terminal property, is responsible for the safe handling of the ship, the delivery and receipt of ship's cargo, and all movement and handling of cargo between the point-of-rest and any place on the marine terminal property except to shipside. The terminal property includes heavy lift cranes, forklift trucks, straddle carriers, platform trailers, and other equipment. In most ports, stevedore contractors and marine terminal operators are separate and unrelated jobs.

A stevedore or stevedore contractor is responsible for loading or unloading a ship in port by contract with a shipowner, agent, or charter operator. In the past, the stevedore, as the employer of the longshoreman, was a labor broker with little financial investment beyond providing safety and primitive cargo handling equipment. Currently, the stevedore has a substantial financial investment in such cargo handling equipment as forklift trucks, newsprint roll handling equipment, trailers for the placement of cargo containers, bulldozers, payloaders, and other machinery.

Stevedore operations are confined to the area between the ship and the terminal area called the "point of rest." This is the area close to the ship being loaded or unloaded where cargo is placed before delivery or further handling by the owner or operator of the marine terminal.<sup>[20]</sup>

The Federal Maritime Commission confirms the distinctions drawn above. According to the Commission, terminal "handling" is "[t]he service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of the ship's tackle." 46 C.F.R. § 533.6 (1976). Terminal "loading and unloading" is "[t]he service of loading or unloading cargo between any place on the terminal and railroad cars, trucks, lighters or barges to or from the terminal facility." *Id.*<sup>21</sup>

The same distinction is reflected in the results of a

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<sup>20</sup> *Office of Workers' Compensation Programs, U.S. Dept. of Labor, Task Force Report at 103-104 (1976) (hereinafter "OWCP Task Force Report")*. The findings and recommendations of the Task Force were submitted for the approval of the Secretary of Labor on Dec. 15, 1976.

<sup>21</sup> See also *Truck and Lighter Loading and Unloading*, 9 F.M.C. 505, 511-12 (1966) (stevedoring is "breaking cargo out of stow in the ship's hold, lifting the cargo from the vessel and depositing it on the pier's stringpiece and then carting it by hi-los to the place of rest designated by the stevedore").

recent survey conducted by the National Association of Stevedores of practices at 36 major United States ports:

Essentially, the movement of water-borne commerce across marine terminals in the United States involves two distinct and separate functions which are performed by two distinct employers. The stevedore employer hires longshore labor to physically load cargo onto or unload cargo from a vessel. In the case of imported cargo, the cargo unloaded from the vessel is moved by the longshore workers to storage area, holding area, or marshalling area known throughout the maritime industry as the "point of rest". In the case of exports, the cargo is moved from the "point of rest" to and then onto the vessel.

Any movement or handling of water-borne cargo, import or export, between the point of rest and any place on the marine terminal or away from the terminal facility is a terminal operation performed by a marine terminal operator, private or public. The labor which performs such functions are terminal labor, sometimes called "shortshoremen". Although the workers which perform stevedore and terminal functions may be from the same union organization, each class of worker is paid from a separate payroll and are subject to special work rules.

The statements all agree on one concept long accepted throughout the maritime industry—that there is a clear and distinct line of separation between stevedoring and marine terminal functions. The functional separation takes place at the point of rest where control and responsibility for the cargo is transferred between the stevedore and the marine terminal operator. Labor contracts change at the point of rest as does the interest for whom the services are performed. \* \* \* [22]

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<sup>22</sup> This survey is reprinted at pp. 7a-77a of the Appendix to the Memorandum filed by the National Association of Stevedores in response to the Petition for Writ of Certiorari in *Adkins v. I.T.O.*



Although sometimes a single company will perform both stevedoring and marine terminal services, very often these functions are carried out by separate companies. The distinction between stevedoring and terminal operations is especially clear in those ports, such as Camden, New Jersey,<sup>23</sup> Portsmouth, Rhode Island,<sup>24</sup> Charleston, South Carolina,<sup>25</sup> Georgetown, South Carolina,<sup>26</sup> Jacksonville, Florida,<sup>27</sup> Savannah, Georgia,<sup>28</sup> Wilmington, North Carolina,<sup>29</sup> Mobile, Alabama,<sup>30</sup> and others, where the employees who perform terminal labor are actually *State government employees*, a class Congress clearly did not intend to cover.

In the Port of New York, where Blundo was employed at the time of his injury, the distinction between terminal and stevedoring functions is strictly maintained:

Historically our industry in New York has been divided into two segments—Stevedoring and Terminal operations. Prior to the Waterfront Commission, truck loading and unloading was done by Public Loaders and vessel operations performed by contract stevedores. Their functions were distinct and separate. After the demise of the Public Loaders, the majority of large steamship companies performed their own terminal operations while vessel work remained with the contract stevedore. Most stevedoring companies then assumed the role of

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*Corp.*, No. 76-730, *petition for cert.* filed November 24, 1976. The section of the survey cited above appears at pp. 11a-12a of the Appendix (NAS Mem. A. 11a-12a).

<sup>23</sup> *Id.* at 21a. (Camden Marine Terminal).

<sup>24</sup> *Id.* at 25a (Davisville, Rhode Island Pier 1 & 2).

<sup>25</sup> *Id.* at 28a.

<sup>26</sup> *Id.* at 29a.

<sup>27</sup> *Id.* at 30a.

<sup>28</sup> *Id.* at 44a.

<sup>29</sup> *Id.* at 48a.

<sup>30</sup> *Id.* at 55a.

terminal operator in the servicing of their various accounts. It was not then and still is not unusual today, however, to have two different contractors (stevedoring and terminal) servicing a steamship company on the same facility.

As previously mentioned there is a clear distinction between the function of a stevedore and terminal operator in the Port of New York. The stevedores responsibility lies in the handling of cargo between the ship and the "point of rest" as defined by the Federal Maritime Commission in its General Order 15. All other services are handled by the terminal operator. Labor is specifically hired by category and is allocated and shown to be utilized in either the stevedoring or terminal function by the operator.<sup>[31]</sup>

The distinction between stevedoring and terminal operations in New York manifests itself in the details of employment practices:

\* \* \* \*

- b) Terminal facilities—most are owned by the New York-New Jersey Port Authority or the City of New York and are leased directly to a steamship company or a terminal operator. In many instances a steamship company will lease the facility and will engage a terminal operator for both the stevedoring and terminal function. In other cases a company will be employed to perform stevedoring function while the terminal operations will be performed by a different company. The stevedoring company's function is between the vessel and a place of rest with the terminal function taking over from that point.
- c) Union contracts call for the hiring of labor by category *i.e.*, terminal labor, drivers, ship labor, checker, coopers, maintenance, mechanics, etc. A man cannot be hired for terminal labor and be assigned to work on a vessel or vice versa.

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<sup>31</sup> *Id.* at 27a.

- d) Separate allocations of payrolls are made for vessel and terminal operations even when handled by the same company. Such a difference is necessary also for cost analysis as in most cases rates are quoted on a separate basis.

\* \* \* \*

- g) Cargo checkers could be utilized in both vessel and terminal operations during the same day when performed by the same contractor. It is normal, however, for a checker to spend a full day in either operation without shifting. When performing in both functions each area is easily defined.
- h) Truck and car loading and unloading is performed by longshoremen and drivers with terminal labor category. They are employed by the company performing the terminal labor services.<sup>[32]</sup>

2. *The stevedoring function of loading and unloading vessels is carried out by longshore gangs engaged on an hourly basis through a union hiring hall by a stevedore employer.*

The distinction between the stevedoring and marine terminal functions is reflected in the strict divisions among categories of employees on the waterfront. As noted above, in the Port of New York separate allocations of payrolls are maintained for terminal and stevedoring employees, and union contracts require that labor be engaged by categories (checker, driver, terminal labor, etc.) which also reflect the division between terminal and stevedoring labor. In many ports terminal and stevedore laborers belong to different locals of the same union,<sup>33</sup> or different unions. As noted above, terminal employees are often state or local government employees working for the Port Authority. Among private employers, extended

<sup>32</sup> *Id.* at 26a-27a.

<sup>33</sup> *Id.* at 11a.

definitions of stevedore (longshore) and terminal (warehouse) employment appear in many collective bargaining agreements.<sup>34</sup>

The division of labor reflected in longshore labor agreements is perfectly consistent with the strict distinction

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<sup>34</sup> See, e.g., the Deepsea Longshore Agreement and the Warehouse Contract for Southeast Florida:

Longshore Work Defined, Gang Sizes, Employers Rights

- 13(A)(1) Longshorework is to cover all labor used in connection with loading or discharging ships, barges or other floating craft. It will include men engaged in handling cargo to or from point of rest or to or from cars or trucks when handled direct to or from ships. It will also include all operators of mechanical equipment used in such operations, provided, however, that this shall not require the employers to alter any existing practices. It will also cover cooping or reconditioning of cargo when performed in connection with stevedoring work; the handling of ship's stores when not carried by hand up the gangway; the handling of baggage to and from ship's deck of passenger vessels; all mail; dunnaging (excluding bulk separations); rigging (excluding rigging for heavy lifts); and the following operations when vessel is alongside dock; cleaning of cargo areas aboard ship, lashing and unlashng and securing of cargo, and the fitting and dismantling of fittings. It will also include gearman (not mechanics) when assigned to ships; the operation of all permanently mounted shipboard cranes and winches; and the handling of lines when performed by stevedores. It also includes opening and closing of hatches on conventional type vessels with between decks when working general cargo. \* \* \*

Warehouse Work

- 13(A) Warehouse work shall be defined to include handling of cargo in shipside warehouse/transit sheds and port areas, when such cargo is not handled in conjunction with ships loading or discharging.

Warehouse work will include loading and discharging of railroad cars, loading and unloading of drop trailers and piggyback trailers; also the loading and unloading of trucks and trailers where the nature or weight of the cargo is such that this loading or unloading cannot be accomplished by driver, the employer will use I.L.A. labor to help the driver. \* \* \* [*Id.* at 36a-38a.]

between stevedore and terminal labor which in practice prevails on the waterfront. The physical loading and unloading of ships is typically performed by a longshore gang, the exact composition of which for any given vessel depends on custom and agreement in the port in which the vessel is loaded or unloaded.<sup>35</sup> A description of the longshore gang structure is contained in the Department of Labor's recent OWCP Task Force Report:

\* \* \* Because ship arrivals are irregular, a stevedoring company may work several ships or none at all on any given day; consequently, the demand for labor varies widely from day to day.

Longshoremen work in a gang or crew distributed between the ship and the pier so they can move

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<sup>35</sup> The significance of the gang structure in longshore work has been described by Rubin & Swift as follows:

One of the most important features of longshore work is the gang structure requiring the coordinated efforts of men working in the hold, on the deck, and on the dock. Gang members have always been required to work closely together for long and continuous periods of time. Since cargo handling requires a team effort and emphasis has always been placed upon fast ship turn-around time, employers are primarily interested in keeping the gangs intact throughout the job rather than hire others unfamiliar with the ship and the other members of the gang. On the other hand, because the longshoreman does not know when the next ship will arrive or if his gang will be chosen to work, he prefers to work as long as the job lasts with little regard for time off. The resulting system of work relationships and patterns benefits both the employer and the employees. For the longshoremen, the permanent gang system increases his job prospects and for the employers, it increases efficiency and safety.

In several of the major ports, gangs are hired rather than individual longshoremen. Usually, a gang boss or foreman, is selected for a job, and he either assembles his regular gang or chooses from among his following of longshoremen. In either case, the composition of the gang does not vary greatly from day to day. When a regular member of a gang is absent, the gang boss selects an "unattached" longshoreman to fill in on a temporary basis. [*Rubin and Swift, supra* at 11-12.]



cargo in an uninterrupted flow. A longshoreman may be designated by the equipment he operates—*i.e.*, winchman or hustler operator, or by the area in which he works—*i.e.*, holdman. An average gang consists of 1 foreman, 6 to 10 men working in the hold of the ship, 1 hatchtender, 2 winchmen, and 6 to 8 truckers. The longshore gang varies from 12 to 20 workers for break bulk work (historically, the typical gang) to varying numbers for specialty work on bulk, containers, and utilized loads.

For example, the typical break bulk gang in the port of Philadelphia is composed of 20 men: 15 regular and 5 new men. Nine to 12 are holdmen. Three of the best and most experienced are deckmen: one winch operator, one hatchman giving the signals, and one relief person. Four gang members are dockmen: two doorway men, who hook and unhook loads, and two forklift operators. One gang member, hired by the stevedoring company, serves as the foreman and hires the other gang members.<sup>[36]</sup>

The distinction between the work of the gang loading or unloading a ship and the work of terminal labor (“extra dock labor” or “extra labor”) is one that is strictly maintained in labor contracts. For example, in Boston, the General Cargo Agreement clearly spells out the activities of “extra dock labor”:

Extra-dock labor shall be utilized for but not limited to the following purposes, cooping damaged cargo, palletization, *container loading and unloading*, and voluntary truck loading and unloading.

The Employer has the right to assign the number of employees he selects and the place of employment at the terminal or pier.

The Employer has the right to assign the employees at any time to another terminal under his control.

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<sup>36</sup> OWCP Task Force Report at 104.

The consignee, shipper or his designee, shall have a free choice in his selection of a loading or unloading agent, such loading or unloading including but not limited to trucks, railroad cars and lighters.

It is understood that further sorting that may be required after a vessel has completed its loading-discharging operation shall be performed by extra-dock labor as an independent operation at the time directed by the Employer and *shall not in any way be considered part of a gang operation.*

Extra-dock labor may be given back to a finish orders.

Extra-dock labor may be utilized to fillout incomplete gangs working at that terminal and/or pier when no additional men required by the Employer are available at the Hiring Hall.<sup>[37]</sup>

The same distinction is applicable in the Port of New York:

The loading and unloading of vessels is done by gangs of longshoremen, under the immediate supervision of gang or hatch bosses. General work around the pier is done by longshoremen called extra labor.<sup>[38]</sup>

See also Part X, par. 4.A.5 of the current New York Collective Bargaining Agreement, *supra*, which provides that:

Flexibility [in the assignment of men] shall not extend to the interchange of gang and terminal assignments.

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<sup>37</sup> *General Cargo Agreement between the International Longshoremen's Association and the Boston Shipping Association* (emphasis added). This agreement was part of the record in *Stockman v. John T. Clark & Sons*, *supra*. See Petition for a Writ of Certiorari in *John T. Clark & Sons v. Stockman*, No. 76-571, at 6.

<sup>38</sup> Fourth Report of the New York State Crime Commission (Port of New York Waterfront) (May 20, 1953), Appendix at 167.

3. *The process of loading or unloading a vessel consists of the continuous movement of cargo by a longshore gang between the deck or hold of a vessel and the cargo's point of rest on the adjoining pier.*

By settled industry practice, the stevedoring or longshoring operation of loading and unloading a vessel has been defined as the process of moving cargo between the deck or hold of the vessel and the cargo's point of rest on the adjoining pier. The Department of Labor's OWCP Task Force Report contains a discussion of the "Nature and Character of the Longshore Industry" which expressly confirms this definition:

Stevedore operations are confined to the area between the ship and the terminal area called the "point of rest". This is the area close to the ship being loaded or unloaded where cargo is placed before delivery or further handling by the owner or operator of the marine terminal.<sup>[39]</sup>

Rubin and Swift's description of "longshore work" is similarly based on the concept of "point of rest":

#### Nature of the Work

In essence, longshore work consists of loading and unloading ships, and has been further defined as "all handling of cargo in its transfer from vessel to first place of rest, and vice-versa, including sorting and piling of cargo from vessel to railroad car or barge, or vice-versa." [Note 2. Pacific Coast Longshore Agreement, 1956, as cited in Maritime Cargo Transportation Conference, Longshore Safety Survey (Washington: National Academy of Sciences, 1956), p. 13.] The entire cargo-handling operation is somewhat more complicated, however, and it is appropriate first to differentiate the various jobs performed by longshoremen from those

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<sup>39</sup> OWCP Task Force Report at 104.

done by other laborers working in the port area, and secondly to describe the job functions within the longshore gang. This can be accomplished by tracing the movement of cargo through the loading process. It should be noted, however, that the occupational structure in the industry varies somewhat from port to port.

Generally, cargo arrives on the pier by truck or by railroad car several days prior to its scheduled loading aboard ship. When the cargo is delivered to the terminal, it is separated, grouped, and stored in the marine terminal adjacent to the dock loading area. Once placed in temporary storage, the cargo is said to be in its "last place of rest." Up to this point, the work is generally performed by truck drivers, helpers, and warehousemen, although in some ports it is feasible for longshoremen to perform these functions.

Typically, longshore work begins with the movement of cargo from this "last place of rest," combining the efforts of three separate units of dock, deck, and hold gangs, which comprise the larger longshore gang. \* \* \*<sup>[40]</sup>

The "point of rest" concept goes far toward providing a clear test by which to distinguish the activities of vessel loading and unloading from various other waterfront activities not covered by the Act. In every United States port, the "point of rest" of export and import cargo marks a familiar dividing line actually used or referred to by the industry and its employees in stevedore contracts, terminal operation or warehousing contracts, collective bargaining agreements, hiring practices, maritime tariffs, and other practical business transactions which are entered into on a daily basis.<sup>41</sup> Those who make

<sup>40</sup> *Rubin and Swift, supra* at 9-10.

<sup>41</sup> See *Pacific Coast Longshore Agreement*, (1956) quoted in National Academy of Sciences-National Research Council, *Maritime*

their living on the waterfront, employer and employee alike, recognize the point of rest and refer to it continually in their occupation.

There is no doubt that "point of rest" is an accepted demarcation of responsibilities at the Port of New York where Blundo was injured. The Federal Maritime Commission has labelled "correct" an examiner's determination that stevedoring at New York with respect to import cargo is "one process of breaking cargo out of stow in the ship's hold, lifting the cargo from the vessel and depositing it on the pier's stringpiece and then carting it by hilos to the place of rest designated by the stevedore."<sup>42</sup> The recent OWCP Task Force Report quoted *supra* similarly describes the stevedoring function as cargo handling between ship and "point of rest" which is defined as "the area close to the ship being loaded or unloaded where cargo is placed before delivery or further handling by the owner or operator of the marine terminal."<sup>43</sup>

Outside the industry, the point of rest concept has frequently been recognized and relied upon by courts and agencies which have dealt with issues arising out of the maritime occupation of loading and unloading vessels.<sup>44</sup>

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Cargo Transp. Conf., *Longshore Safety Survey* 13 (1956) (longshorework is "all handling of cargo in its transfer from vessel to first place of rest, and vice versa"). See also *Los Angeles By-Products Co. v. Barber S.S. Lines, Inc.*, 2 U.S.M.C. 106, 111 (1939); *Empire State Highway Trans. Ass'n. v. American Export Lines, Inc.*, 5 F.M.B. 565, 572 (1959); *Los Angeles Traffic Mgrs. Conf., Inc. v. Southern California Carloading Tariff Bureau*, 3 F.M.B. 569 (1951); 46 C.F.R. § 533.6 (1976) ("point of rest" defined for purposes of terminal tariffs).

<sup>42</sup> *Truck and Lighter Loading and Unloading*, *supra* at 511-12.

<sup>43</sup> OWCP Task Force Report at 104.

<sup>44</sup> *E.g.*, *ILA v. North Carolina State Ports Authority*, 332 F. Supp. 95, (E.D.N.C. 1971), *rev'd on other grounds*, 463 F.2d 1 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *American President Lines, Ltd. v. Federal Maritime Bd.*, 317 F.2d 887, 888 (D.C. Cir. 1962) (duty



On occasion, however, courts and agencies not well versed in, and not well advised of, the nature of longshoring operations have misunderstood the meaning and significance of point of rest in the loading/unloading process. In order to avoid any such misunderstanding in this case, considerable care has been taken in this brief to demonstrate the importance of point of rest and its relationship to the activity of loading and unloading vessels. Two further observations regarding point of rest require specific mention.

First, the point of rest of export and import cargo should not be confused with the point at which unloaded cargo is first deposited onto the pier at the "ship's side" by the crane operator. This location, sometimes referred to as "under the hook," is not ordinarily a point of rest because the practical nature of the unloading process requires that cargo be removed therefrom continuously to make room for additional cargo as it is unloaded from the ship. Similarly, in the loading process the last point of rest is not that location at the "ship's side" from which the crane lifts drafts, pallets, or containers for loading into the ship. Rather, it is the temporary storage or holding area from which the longshore gang moves

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of carrier extends to placing cargo at a "place of rest on the pier"); *Los Angeles Traffic Mgrs. Conf., Inc. v. Southern California Carloading Tariff Bureau*, 3 F.M.B. 569 (1951); *Carloading at Southern California Ports*, 3 U.S.M.C. 137 (1949); *Status of Carloaders and Unloaders*, 3 U.S.M.C. 116, 118 (1949); *In re Assembling and Distributing Charge*, 1 U.S.S.B. 380, 383-85 (1935); *Associated Jobbers & Mfrs. v. American-Hawaiian S.S. Co.*, 1 U.S.S.B. 198, 200 (1931); *J. G. Boswell Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95 (1939); *In the Matter of the Arbitration Between Pacific Coast District Local 38 and Waterfront Employers* (1934), 25 NLRB San Francisco Admin. File, Box 485; *Rubin and Swift at 10*, (longshore work begins at "last place of rest"); *Longshore Safety Survey, supra* at 17; Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 Labor L. J. 397, 398 (1970) ("loading and unloading \* \* \* consists of moving cargo from the hold of the ship to the first place of rest on the dock.")

cargo in a continuous process of loading a vessel. The point of rest should therefore be viewed not mechanically as the place of first or last physical contact between cargo and pier, but functionally, as a signal that the activity of loading or unloading has begun or is complete.

Second, the point of rest is not primarily a geographic concept, although its geographic contours may be quite precise at any given waterfront facility. As explained above, the point of rest is a functionally determined point, the geographical location of which at any given facility may depend upon a variety of practical factors inherent in the loading or unloading process. Thus, reference to point of rest in interpreting the Act's coverage does not, as has been suggested,<sup>45</sup> create a new "situs" requirement. Rather, it helps to establish the "status" requirement by fixing a realistic point, well recognized in the longshore industry, at which the "maritime employment" of loading and unloading vessels begins or ends. A member of a longshore gang who is engaged in unloading cargo to the point of rest does not lose coverage by stepping shoreward of the point of rest. Conversely, a terminal employee who happens to wander seaward of the cargo's point of rest long after the unloading process has been completed does not thereby become eligible for coverage. The test of coverage in each case, insofar as "status" is concerned, is not the injured worker's location with respect to the point of rest, but his participation in the process of moving cargo between the point of rest and the ship.

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<sup>45</sup> *I.T.O. v. Benefits Review Bd.*, *supra* at 1096-97 (Craven, J., dissenting).

4. *In the case of a container operation, the process of unloading ends when the container has been removed from the vessel, placed on a truck chassis, and carried to its point of rest in the container marshalling yard.*

Blundo was injured while checking the contents of a container which had been unloaded from the vessel by a longshore gang as much as a week before, placed at rest in the container marshalling yard of the unloading terminal, trucked by an independent common carrier several miles over public streets to ITO's 19th Street pier in Brooklyn, and placed alongside the bonded warehouse at that location. By any standard discernible in industry practice or the legislative history of the 1972 amendments, the process of unloading had ended long before Blundo began work on the day of his injury. As in the case of other types of cargo, the process of unloading containerized cargo ends when the container reaches its point of rest in the container marshalling yard.

Although containerization has revolutionized the shipping industry, the process of loading and unloading containerized cargo is not conceptually different from the process of loading and unloading general or break-bulk cargo. The work is done by a longshore gang hired specifically for the loading or unloading of the particular vessel. The gang is supervised by a foreman, or hatch boss. In New York, the other members of the standard container gang include four to six holdmen who work on the vessel, two gangway men, three crane operators, six dock workers, and five yard-hustler or truck drivers. In the case of unloading, containers are lifted from the deck or hold of the container vessel by a large pier-based crane, and lowered onto an empty truck chassis pulled by a "yard hustler" driven by a member of the gang.<sup>46</sup> The

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<sup>46</sup> In some unloading operations the container is placed directly onto railroad cars or trucks for immediate transshipment beyond the terminal.

container is then driven away from the ship's side toward the container marshalling yard nearby, and another yard-hustler drives into position "under the hook" to receive the next container.

The container marshalling yard is the place within the container terminal where containers are stored temporarily awaiting further transshipment to consignees or terminal operators (import cargo) or loading aboard ship (export cargo). Geographically, the marshalling yard is a precisely defined area, separate and apart from other areas in the terminal. Upon arrival at its designated location in the marshalling yard, the container is detached or removed from the yard-hustler, which then drives back to ship's side to pick up another container.

The longshore gang members, from the holdmen to the yard-hustler drivers, who are responsible for removing the container from the vessel to the container marshalling yard are engaged in the unloading function and are therefore covered by the Act:

To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. [*H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13.]

Similarly, checkers "directly involved" in the gang's unloading work would also be covered.<sup>47</sup> To extend coverage beyond this group of employees, however, to the various categories of waterfront workers not involved in loading or unloading vessels, would be contrary to the intent of the 1972 coverage amendments.

<sup>47</sup> *H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13.

The arrival of the container at its point of rest in the marshalling yard is a significant event in the movement of cargo from the vessel to the consignee, for it is at this stage in the process that the stevedoring function of unloading the vessel ends, and the terminal, warehousing or transshipment functions begin. What happens to a container after it leaves the marshalling yard depends on a variety of factors and considerations which bear little or no relation to the nature of the activity covered by the Act.

For the first few days after unloading, known as "free time," the container may remain at the marshalling yard without being assessed "demurrage" or storage charges.<sup>48</sup> Ordinarily, cargo is removed from the point of rest within the "free time" period or shortly thereafter. Very frequently, however, cargo (whether containerized or break-bulk) remains at the point of rest for long periods of time after the vessel has been unloaded, or before it is loaded.<sup>49</sup>

After the container is picked up from the marshalling yard, it is no longer possible to generalize about what happens to it. Depending on the circumstances, the container may be picked up by the consignee, by his agent, by the terminal operator, or by an independent trucking firm. The container may be transported inland to the

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<sup>48</sup> The concept of "free time" is defined in the regulations of the Federal Maritime Commission at 46 C.F.R. § 533.6 (1976).

<sup>49</sup> See *Dellaventura v. Pittston Stevedoring Corp.*, 2 BRBS 340 (Oct. 9, 1975) (113 days before loading); *Spataro v. Pittston Stevedoring Corp.*, 1 BRBS 42 (ALJ) (Feb. 6, 1975) (23 days after unloading); *Esposito v. Hellenic Lines, Ltd.*, 1 BRBS 84 (ALJ) (Mar. 24, 1975) (13 days after unloading); *Foundation v. Puget Sound Terminals, Inc.*, 1 BRBS 95 (ALJ) (April 3, 1975) (14 days after unloading); *Eutsay v. Universal Terminal*, 2 BRBS 83 (ALJ) (June 26, 1975) (at least 3 weeks after unloading); *Robinson v. Northern Metal*, 2 BRBS 240 (ALJ) (Sept. 8, 1975) (5 weeks after unloading).



consignee's warehouse or to an independent freight consolidation warehouse, or it may be transported to a warehouse in the same terminal, or to another pier or warehouse in the same port, or even to a pier or warehouse in some other port. The container may ultimately be stripped by employees of the consignee, or of his agent, or of an inland warehouse, or of the terminal operator, or of the Port Authority. The company doing the stripping may or may not be the same company which has performed the unloading function, and may or may not be an "employer" under the Act. The stripping may or may not be done at a covered "situs". For the most part, the circumstances which determine where and by whom the container is stripped are fortuitous in the sense that they have little or nothing to do with the physical work being performed.

The extension of the Act's coverage to the activity of stuffing and stripping containers and other terminal functions would give rise to new anomalies more serious than that which the 1972 amendments were intended to correct. These potential anomalies arise from the fact that, unlike the activity of loading or unloading a vessel alongside a pier, there is nothing inherent in the activity of stuffing and stripping containers (or other terminal functions) which requires that it be done in a location adjacent to navigable waters, or that it be done by employees of an "employer" otherwise engaged in maritime employment.

Accordingly, under the holding of the court below, the primary differentiating factor among cases involving stuffing and stripping would be not the nature of the work performed, but the situs of the injury. Stuffing and stripping performed on a pier would be covered, while the same stuffing and stripping operation in an off-pier warehouse located in the same port would not be covered, even if performed by members of the same union, hired

by the same employer, as the employee working on the pier. Thus, the fortuitous fact of situs would again be elevated to the determinative criterion—*exactly the situation Congress meant to remedy.*

From an economic standpoint, this disparity is potentially far more significant than the disparity of the longshore gang member “cut in half” at the water’s edge. The stuffing and stripping station on the pier must compete for business with off-pier stuffing and stripping stations, whether they are across the street or miles inland. Because warehousing and terminal operation functions are labor-intensive, small differences in the cost of labor among competitors can make large differences in the competitive positions of the affected companies.<sup>50</sup> As the Department of Labor itself has recognized,<sup>51</sup> and as is explained in more detail in the *amicus curiae* brief of the National Association of Stevedores, the Department of Labor’s interpretation of the 1972 amendments to the Act has resulted in very substantial increases in the cost of labor for covered “employers.” These increased costs, to the extent that they reflect compensation for stuffing and stripping-related injuries based solely on the arbitrary criterion of situs, tend to distort the relative operating costs of essentially identical companies, thereby disrupting the competitive structure of the industry. It seems highly unlikely that Congress, in dealing with the anomaly created by a situs line at the water’s edge, intended to adopt a coverage test which gives rise to still greater disparities between the two sides of the marine terminal fence.

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<sup>50</sup> In some ports, insurance is the single most important element of stevedoring costs, after direct labor. Cooper and Co., “A Causal Study of Accidents in the Longshoring Industry,” prepared for the Department of Labor, Occupational Safety and Health Administration, Division of Program Evaluation and Research (Dec. 1, 1975) at 10.

<sup>51</sup> OWCP Task Force Report at 75 *et seq.*

Similarly, it should be recognized that the extension of the Act's coverage to container stuffing and stripping logically requires the extension of coverage to certain intermediate activities which Congress could not have intended to include within the definition of "maritime employment." Thus, for example, if Blundo was engaged in "maritime employment" at the time of his injury, then it follows that the truckdriver who picked up the container at the marshalling yard and delivered it to the 19th Street pier was also engaged in maritime employment. This truckdriver, a member of the Teamsters' Union and an employee of an independent trucking firm, would therefore be covered under the Act as a "longshoreman or other person engaged in longshoring operations" during all times that he is on a covered situs.<sup>52</sup> Congress cannot be held to have intended a result so plainly contrary to the ordinary concept of "maritime employment". It must be concluded, therefore, that the activity covered by the Act ends at the point of rest, before further transshipment by truck or otherwise. This interpretation is supported by express language in the legislative history of the 1972 amendments:

Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered. \* \* \* [*H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13.]

5. *At the time of his injury Blundo was not engaged in the unloading process.*

The foregoing discussion of the longshore function of loading and unloading vessels helps to place in context the activity in which Blundo was engaged at the time of his injury.

<sup>52</sup> The apparently non-maritime nature of the truckdriver's employer would not exclude coverage, since the amended Act's definition of employer is phrased in such a way as to cover any employer of a covered "employee." Therefore, if the truckdriver is covered, the trucking firm is an "employer" under the Act. *Jacksonville Shipyards v. Perdue, supra* at 538, n. 9.

Blundo was a checker, and had been employed as such for five years prior to his injury. As described previously, these duties are essentially clerical, and do not require the physical handling of cargo which characterizes the work of longshoremen.

Because of the special nature of their duties, checkers have traditionally been set apart from other waterfront occupations. For example, in many ports checkers belong to a separate clerks or checkers union local,<sup>53</sup> and throughout the United States checkers are separately rated for insurance purposes.<sup>54</sup> In industry practice, moreover, the checker is not considered a longshoreman, and is typically not a member of a longshore gang although he may at times work directly with the gang in the loading or unloading process.<sup>55</sup> Although Blundo's duties as a checker occasionally took him aboard vessels (A. 65), there is no evidence that Blundo ever engaged in what the court below has termed "the typical longshoring activity of taking cargo on or off a vessel."<sup>56</sup>

Blundo's testimony as to the general nature of his duties, although limited, is consistent with the description of industry practices set forth above. For example, Blundo testified that his assignment on a particular day may be as a "ship's checker" (stevedore function), or "on the pier" (terminal function) (A. 65). When assigned as a "ship's checker," Blundo is not reassigned to other duties on the pier but remains with the ship until the loading or unloading function is completed (A. 68).

<sup>53</sup> See, e.g., NAS Mem. A. 34a-35a (Miami).

<sup>54</sup> See National Council on Compensation Insurance, *Workmen's Compensation and Employer's Liability Insurance Manual* (1934, as amended through Jan. 1, 1977).

<sup>55</sup> See Groom, *Hiring Practices for Longshoremen*, 88 Monthly L. Rev. 1289 n.1 (1965); *Rubin and Swift* at 10.

<sup>56</sup> Pet. A. 40a.

On the day of his injury Blundo was assigned "on the pier" to work as a checker in the terminal function of stripping containers (A. 68). The stripping took place at ITO's 19th Street stripping and stuffing station in Brooklyn. Blundo was not working on a ship or even near a ship that day. In fact, the 19th Street pier to which Blundo was assigned is never used by ITO, or by anyone else, for loading or unloading vessels.

The only use of the 19th Street pier was as a warehouse for storage of cargo previously unloaded from a vessel or vessels at any one of a number of other facilities. Blundo was working inside the warehouse when he was injured. The incoming cargo which Blundo was checking at the time of his injury was to be stored at the warehouse until it was cleared by United States Customs and picked up by the consignee or his agent.

There is no doubt that the container which Blundo was checking at the time of his injury had previously been unloaded from a vessel at a container facility by a longshore gang. Blundo, however, was not a member of that gang, did not work at that facility, and did not participate in unloading that vessel. In fact, so far removed was Blundo from the process of unloading that vessel that he did not know the name of the vessel or its owner, or where the vessel was unloaded, or by whom it was unloaded, or even when it was unloaded (A. 81-82, 96).

The function which Blundo was performing at the time of his injury did not begin until long after, perhaps as much as a week after, the container had been unloaded and placed at rest in the container marshalling yard at the unloading terminal. Given the tenuous connection between Blundo's injury and the unloading of a vessel, it would plainly be contrary to industry practice and the intent of Congress to extend coverage to Blundo as an employee engaged in "maritime employment."



***C. The definition of coverage advanced herein is based on principles consistently applied by this Court and lower federal courts in interpreting the scope of the Act.***

It is not possible to consider or interpret the coverage provisions of the present Act without reference to the long history of decisions by this Court, and legislative changes enacted by Congress in response to those decisions, which preceded the 1972 amendments. As has been previously explained, the 1972 coverage amendments themselves represented Congress' response to two major decisions of this Court which, taken together, had placed definite limits on the ability of longshoremen to pursue a federal remedy for injuries incurred on the pier in connection with loading or unloading a vessel. *Nacirema Operating Co. v. Johnson, supra*; *Victory Carriers, Inc. v. Law, supra*.

The *Nacirema* and *Victory Carriers* decisions are the most recent in a long line of decisions in which this Court has attempted to reconcile certain substantive principles which have competed for predominant consideration in the interpretation of the Act. As will be shown below, there are three major considerations which have inspired Congress in its development of the Act, and which have guided this Court in interpreting the Act. These are:

- (1) the need for a system of federal longshoremen's compensation which is consistently applicable to a category of maritime workers whose federal "status" is defined functionally, in terms of their individual employment or activity;
- (2) the need for a system which is uniformly applicable in all parts of the United States;
- (3) the desirability of a clear test of federal coverage.

Most problems which have arisen in the interpretation of the Act may in general terms be viewed as the result of conflict between, on the one side, the objectives of certainty and geographic uniformity, and, on the other side, the objective of confining or extending the Act's coverage to workers actually engaged in federal maritime employment. The history of the Act before 1972, both in Congress and before this Court, reflects a strong emphasis on the importance of certainty and geographic uniformity in the application of the Act. Accordingly, although the 1972 coverage amendments expressly established employment "status" as a controlling test of coverage, that test should to the maximum extent possible be applied in a manner which is consistent with the other basic principles of the Act.

When this Court first designated the water's edge as the demarcation between the state and federal workmen's compensation laws it made explicit its purpose to preserve "a system of [federal maritime] law co-extensive with, and operating uniformly in, the whole country."<sup>57</sup> The Court concluded that if State workmen's compensation statutes were allowed to apply to injuries incurred on navigable waters, the result would be "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish \* \* \*."<sup>58</sup> The Court struck down the New York State statute, leaving no compensation remedy at all for injuries incurred on navigable waters.

During the decade between the *Jensen* decision and the enactment of the first Longshoremen's and Harbor Workers' Compensation Act in 1927, the so-called *Jensen* line withstood two attempts by Congress to fill the com-

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<sup>57</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917), quoting from *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874).

<sup>58</sup> 244 U.S. at 217.

pensation void with federal statutes extending state workmen's compensation remedies to injuries incurred on the seaward side of the line. In each case, this Court held the federal statute invalid on the ground that it failed to preserve the uniformity required by the Constitution in maritime matters.<sup>59</sup> In the meantime, the inability of Congress to fill the void left by the *Jensen* decision made it necessary for this Court to explore further the dividing line which delimits exclusive federal maritime jurisdiction. The Court did so in a series of decisions, referred to as the "maritime but local" line of cases, in which certain categories of employment were held to be subject to state jurisdiction even when performed on the navigable waters of the United States. See, e.g., *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

The "maritime but local" cases mark the first attempt to define federal maritime jurisdiction in terms of the character of activity or employment giving rise to the injury. As such, they represent a partial triumph of the "activity" approach to coverage, at the expense of the objective of a uniform maritime jurisdiction, predictable and certain in its application. Almost from the beginning courts found the "maritime but local" distinction difficult to apply, and its uncertain contours confounded

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<sup>59</sup> *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. Dawson Co.*, 264 U.S. 219 (1924);

And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union. [253 U.S. at 164, cited in *Dawson* at 264 U.S. 225.]

many an injured waterfront worker forced to decide, sometimes irrevocably, whether to pursue the federal or state compensation remedy.

Although the "maritime but local" distinction ultimately survived for over forty years, during the entire time it was restricted by Acts of Congress and decisions of this Court.<sup>60</sup> Finally, in 1962 the Court eliminated the "maritime but local" distinction altogether on the ground that the 1927 Longshore Act had superseded it. In so doing, the Court expressly recognized the difficulty which courts had had in applying the distinction:

Meanwhile the Court handed down a number of decisions which appeared to modify *Jensen* by permitting States to apply their statutes to some maritime injuries. But we must candidly acknowledge that the decisions between 1917 and 1926 produced no reliable determinant of valid state law coverage.

\* \* \* \*

No dependable definition of the area—described as "maritime but local," or "of local concern"—where state laws could apply ever emerged from the many cases which dealt with the matter in this and the lower courts. The surest that could be said was that any particular injury might be within the area of "local concern," depending upon its peculiar

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<sup>60</sup> The enactment of the first federal Longshore Act in 1927 removed much of the impetus for further expansion of the doctrine with respect to state compensation statutes. Later, the Court defended the *Jensen* line against encroachment by other federal compensation statutes, in a decision holding that the Longshore Act was the exclusive remedy for a railroad worker injured on navigable waters. *Nogueira v. New York, New Haven & Hartford R.R. Co.*, 281 U.S. 128 (1930). This holding was confirmed twenty-three years later in *Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 334 (1953).

In 1942 the Court made the difficult "maritime but local" decision less agonizing by recognizing a "twilight zone" which (in effect if not in legal theory) gave federal and state compensation statutes concurrent jurisdiction over many activities *Davis v. Department of Labor*, 317 U.S. 249 (1942).

facts. In numerous situations state acts were considered inapplicable because they were thought to work material prejudice to the characteristic features of the general maritime law, particularly in cases of employees engaged in repair work. On the other hand, awards under state compensation acts were sustained in situations wherein the effect on uniformity was often difficult to distinguish from those found to be outside the purview of state laws. [*Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 118, 119 (1962) ; footnotes omitted.]

In returning to the *Jensen* line as the test of coverage under the Act, the Court in *Calbeck* reaffirmed the principles of geographical uniformity and certainty as basic underpinnings of the Act:

In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3 (a) should, then, be construed to achieve these purposes. [370 U.S. at 124.]

Seven years later, when the *Nacirema* Court was asked to extend federal coverage under the Act shoreward across the *Jensen* line, it declined to do so in part because the extension would create uncertainty:

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. [But] \* \* \* construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. [396 U.S. at 223.]

The strict situs test reaffirmed in *Calbeck* and *Nacirema* was fully consistent with the terms of the Act as it



then stood.<sup>61</sup> Before 1972 the Act contained no provision which expressly defined an activity, employment, or "status" of maritime employment which would qualify an injured worker to receive federal benefits. The absence of an express provision, however, is no indication that "status" was insignificant to the purpose of the Act. Other provisions of the Act, operating together, had the effect of approximating a "status" requirement, for in most instances it may be inferred that an "employee" <sup>62</sup> working on "navigable waters" <sup>63</sup> "in the course of [his] employment" <sup>64</sup> for a "maritime" employer <sup>65</sup> is himself engaged in maritime employment. Although there were occasions when the inference seemed weak,<sup>66</sup> for the most part courts did not seem troubled by the potential over-inclusiveness of the strict situs test.

It took *Nacirema*, a celebrated instance of the Act's under-inclusiveness, to prompt Congress to amend the Act's coverage provisions in 1972. The effect of the 1972 amendments is to sacrifice some of the stark clarity of the *Jensen* line for a coverage test which although still well-defined, more accurately conforms to the actual activity of longshoremen on the waterfront.<sup>67</sup> That new

<sup>61</sup> See footnote 6, *supra*.

<sup>62</sup> 33 U.S.C. § 902(3).

<sup>63</sup> 33 U.S.C. § 903(a).

<sup>64</sup> 33 U.S.C. § 902(2).

<sup>65</sup> 33 U.S.C. § 902(4).

<sup>66</sup> See *Pennsylvania R.R. Co. v. O'Rourke*, *supra* at 342 (Minton, J., dissenting).

<sup>67</sup> It is significant that in the same year this Court also abandoned the strict "navigable waters" dividing line which had formerly defined federal admiralty and maritime tort jurisdiction, replacing it with a requirement that an injury arise from "traditional maritime activity." *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972):

In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether

"status" test appears in the form of definition of an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations \* \* \*."

The 1972 coverage amendments should be construed in light of this Court's warning in *Nacirema* that shoreward extension of the Act's coverage, if not delimited by clear and recognizable boundaries, would "perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side." 396 U.S. at 223. The fact is that Congress did put limits on the shoreward extension of coverage, and those limits are plainly expressed in the Act and in the legislative history of the amendments. Although Congress might easily have extended the Act's coverage to the limits of admiralty jurisdiction, or to new categories of persons not

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there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

\* \* \* \*

It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. [409 U.S. at 261, 268.]

The United States Court of Appeals for the Ninth Circuit has recently applied the *Executive Jet* rationale in a Longshoremen's Act coverage case under the 1972 amendments. *Weyerhaeuser Co. v. Gilmore*, *supra*, 528 F.2d at 961. The Ninth Circuit held that a pondman injured at a waterfront sawmill was not engaged in maritime employment and stated:

We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in Sec. 903. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) [other citations omitted.]

directly involved in the activity of loading and unloading ships, it clearly did not do so. Instead, Congress enacted provisions designed to meet the specific need pointed out by the *Nacirema* case for "uniform treatment of longshoremen injured while loading or unloading a ship." 396 U.S. at 223.

The new "status" test deliberately fashioned by Congress to accomplish that end cannot therefore be "read out of the Act," as the court below concedes it has virtually done.<sup>68</sup> Moreover, the history of the Act's development and interpretation by this Court makes it impossible to ignore the principles of certainty and geographical uniformity which are inherent in the Act's purpose. In evaluating any proposed interpretation of the new "status" provision, therefore, all three of the following questions should be addressed:

(1) whether the interpretation of "status" is consistent with the general employment activity or function which Congress meant to cover and the practical divisions of labor on the waterfront;

(2) whether the interpretation of coverage may be applied with certainty and without expensive litigation, by employees, employers, and insurance companies involved in waterfront activity; and

(3) whether the interpretation will result in uniform coverage of employees engaged in similar activities at different locations.

As discussed previously, the interpretation of "status" advanced on behalf of the petitioner herein is the only interpretation consistent with Congressional intent and with the practical divisions of labor on the waterfront. This interpretation of coverage is also far more conducive to certainty and geographic uniformity of application

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<sup>68</sup> Pet. A. 40a.

than the tests of coverage formulated by the court below or by some other Courts of Appeals.

The coverage definition advanced herein may be understood and applied with consistency and certainty by those most affected by it (the longshoremen and their stevedore employers) because it is a definition which is based on familiar industry practice. The distinction between stevedoring and terminal operations, the structure and operation of the longshore gang, the significance of point of rest in the loading and unloading process—these are all concepts which longshoremen and stevedores work with daily in ports throughout the United States. Moreover, these are concepts which are inherent in the activity which Congress meant to cover under the Act: the activity of loading and unloading vessels.

The same consistent conception of the loading and unloading process appears in the decisions of lower federal courts which have been called upon to define that concept in other cases involving injuries to longshoremen. A brief recitation of the facts of a number of cases in which the injured employee was determined to have been involved in the loading or unloading process will demonstrate the similarity:<sup>69</sup>

1. In *Hagans v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3d Cir 1963), the injured longshoreman was a member of a "regular gang" of twenty-two longshoremen, eight of whom worked in the hold of the ship. The rest, including Hagans, worked on the pier. [318 F.2d at 565.]<sup>70</sup>

<sup>69</sup> These cases arose in connection with the "seaworthiness" doctrine, under which recovery is allowed for certain injuries incurred in the service of a ship. The 1972 amendments eliminated the "seaworthiness" remedy for longshoremen covered by the Act.

<sup>70</sup> Hagans' duties were described by the Third Circuit as follows:

He was unloading bags of sand from the motor towed trucks and placing them in their *first immobile resting place ashore*.

2. In *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964), the injured longshoreman was a member of a stevedoring company's gang of longshoremen employed to load shipments of steel aboard a vessel lying anchored in navigable waters. The steel was being loaded directly into the vessel from gondola freight cars in which it had been shipped and which were on the pier alongside the vessel.

3. In *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir.), *cert. denied*, 382 U.S. 938 (1965), the injured longshoreman was a member of a gang engaged in unloading a bulk cargo of nitrate of soda from a vessel by means of shorebased crane and hopper. The crane lifted buckets of nitrate from the hold of the vessel into the hopper, which then discharged the nitrate in five-bucket truckloads into trucks waiting under the hopper. The longshoreman, who was operating the hopper, was injured when a bucket load of nitrate was dropped into the hopper.

4. In *Garrett v. Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1974), the plaintiff, a longshoreman, was a member of a gang of longshoremen employed in connection with the discharge of the cargo of pulp paper.<sup>71</sup>

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They were the same bags handled by his fellow longshoremen who had started the process of discharge of the cargo in the hold of the vessel. The pier apron could not contain the large number of bags which, in any event, had to be protected from the weather, by being placed within the pier building. The conclusion is inescapable that Hagans performed an integral part of the unloading of the vessel and thus as a matter of law he was in the ship's service. [318 F.2d at 571; emphasis added.]

<sup>71</sup> At 8:00 A.M. the longshoremen began unloading the cargo. As is customary in the stevedoring industry the gang was divided into functional work groups; some were ordered to work on the ship while various duties were assigned to others on the pier. [Plaintiff] and others were to stack the cargo as it was



5. In *Chagois v. Lykes Bros. S.S. Co.*, 432 F.2d 388 (5th Cir. 1970), *rev'd on other grounds on motion for reconsideration*, 457 F.2d 343 (5th Cir.), *cert. denied*, 409 U.S. 1012 (1972), the injured longshoreman was a member of a gang of longshoremen assigned to load bulk rice from railroad boxcars on the pier into the hold of the vessel.

6. In *Pope & Talbot, Inc. v. Cordray*, 258 F.2d 214 (9th Cir. 1958), the injured worker was the foreman of a longshore gang working on the dock in conjunction with another gang working aboard a vessel during the unloading process.<sup>72</sup>

delivered to them by other members of the "dock gang" in a storage shed located on the pier.

\* \* \* \*

\* \* \* The cargo was removed from the ship in the customary manner. Once the cargo was removed from the ship's hold and placed on the dock the bales would be disconnected from the ship's gear. Members of the "dock gang" then moved the bales one at a time via hand trucks into a shed on the pier some twenty-five or more feet from the side of the ship. [Plaintiff's] work gang was instructed to stack the bales four high as they arrived in the shed. The cargo was transferred from the pier apron and stacked in the shed to facilitate the removal of more bales from the hold. [491 F.2d at 230.]

<sup>72</sup> It was one of Cordray's duties to see that the cargo was moved to its *first place of rest* from the ship's tackle, and it was his duty also to coordinate the activities of the dock working longshoremen with those of the ship working longshoremen \* \* \*. [258 F.2d at 215.]

\* \* \* \*

Under the testimony, he was coordinating the unloading of the cargo from the ship's hold to its place of rest on the dock. We hold that the duty of providing a seaworthy ship and gear at the time of this accident extended to the appellee, whether or not appellee was on board the ship or on the dock. The test is, what was the nature of his work? He was performing a service for the ship in the discharge of its cargo. His employer was under contract with the shipowner to take the cargo from the shipside and to put it in a place of storage, and appellee was engaged in the performance of this work. [258 F.2d at 217-18; emphasis added.]

7. In *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303 (9th Cir. 1970), the injured worker was a "‘marine clerk longshoreman’ whose duty station was at ship’s side near a pier-based crane." His role in the loading operation was to position, in proper sequence, the straddle carriers under the crane. The containers left by the straddle carriers were then lifted directly onto the ship by crane.

8. In *McNeil v. A/S Havtor*, 326 F. Supp. 226 (E.D. Pa. 1971), *rev’d on other grounds on motion for reconsideration*, 339 F. Supp. 1264 (1972), the injured worker was a member of a longshore gang engaged in loading a vessel. His job in the gang was to operate a squeeze lift truck in the confines of a warehouse or pier shed.<sup>73</sup>

9. In *Litwinowicz v. Weyerhaeuser S.S. Co.*, 179 F. Supp. 812 (E.D. Pa. 1959), the injured workers were longshoremen engaged in the activity of loading steel onto a vessel.<sup>74</sup>

The facts of the foregoing "loading/unloading" cases illustrate the consistency with which lower federal courts have approached the definition of the loading and un-

<sup>73</sup> Libellant himself did not go aboard defendant’s vessel to physically place the cartons on shipboard. However, other longshoremen in the same gang using fork lift trucks transferred the pallets which libellant loaded from the pier to the ship’s side. Thereafter, ship’s tackle lifted the cargo aboard for storage and ultimate sea carriage. [326 F. Supp. at 227.]

<sup>74</sup> The fact remains, however, that plaintiffs were engaged in the work of loading \* \* \*. It is of no moment that the draft was raised and then lowered onto chocks before it began its upward and lateral movement into the ship. The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiffs’ actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel, which constituted the work of loading. [179 F. Supp. at 817-18.]

loading process.<sup>75</sup> Cases in which the injured worker was determined *not* to have been involved in the loading or unloading process are equally instructive.<sup>76</sup>

It cannot be presumed that when Congress enacted the 1972 coverage amendments it was simply ignorant of these decisions defining "loading" and "unloading" of vessels in the context of federal jurisdiction over longshore injuries. Indeed, since these decisions were rendered in connection with the "seaworthiness" doctrine, and

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<sup>75</sup> See also *Brock v. Baroid Div. of Nat'l Lead Co.*, 339 F. Supp. 728 (W.D. La. 1972) ("roustabout" employed by a drilling company injured while unloading a vessel which had brought supplies to drilling platform); *Byrd v. American Export Isbrandtsen Lines, Inc.*, 300 F. Supp. 1207 (E.D. Pa. 1969) (longshoreman injured while engaged in an attempt to move a forklift truck from the back to the front of the pier during the loading operation); *McCross v. Ratnakar Shipping Co.*, 265 F. Supp. 827 (D. Md. 1967) (seven cases involving employees of stevedoring companies injured while engaged in the physical activity of taking cargo on or off a vessel); *Calderone v. Naviera Vacuba S/A*, 204 F. Supp. 783 (S.D. N.Y. 1962), *aff'd*, 325 F.2d 76 (2d Cir. 1963) (checker directly involved in the process of loading and unloading a vessel).

<sup>76</sup> See, e.g., *Young v. Chevron Oil Co.*, 314 F. Supp. 1278 (E.D. La. 1970), in which a "roustabout" was injured "while transferring cargo off the wharves after it had been unloaded from a vessel":

While Young claims he was injured in the "unloading operation" and claims that the transfer of discharged cargo is an "integral part" of the unloading operation, the cargo had already been unloaded from the supply boat by another crew using another crane at least one hour before he tried to clear the dock \* \* \*.

\* \* \* \* \*

The transfer of cargo subsequent to the actual unloading of the vessel is an indispensable part of the process of getting it moved from the port of shipment to its ultimate destination, but this act is not sufficiently connected with the unloading of a vessel to make it a part of the seaman's work. [314 F. Supp. at 1281.]

See also *Lassiter v. United States Lines, Inc.*, 370 F. Supp. 427, 432 (E.D. Va. 1973) (longshoreman injured while stripping a container which had been unloaded from a vessel more than sixty days previously held "not injured while loading or unloading a vessel.")

since the elimination of the "seaworthiness" doctrine with respect to longshoremen was the primary subject of testimony before both the Senate and House Committees in 1972 and is one of the main features of the amendments as enacted, it is reasonable to conclude that Congress meant to replace the discarded "seaworthiness" remedy with a compensation remedy of the same general scope. At a minimum, the close connection between the "seaworthiness" and compensation remedies makes it likely that Congress had in mind similar definitions of "loading" and "unloading" with respect to both.

The concept of loading and unloading advanced herein and in the seaworthiness cases summarized above would promote not only certainty and predictability, but also geographic uniformity in the application of the Act to the various ports of the United States. As noted above in the discussion of industry practice in the stevedoring and marine terminal industry, the point of rest on the pier to which cargo is unloaded from a vessel by the longshore gang marks the last real point at which it is possible to generalize about cargo-handling practices among ports, or even among different facilities of the same port.

For example, the present ILA collective bargaining agreement in the Port of New York, which was in existence at the time of Blundo's injury, provides that "\* \* \* stuffing and stripping [of containers] shall be performed on a waterfront facility, pier or dock."<sup>77</sup> Thus, under the holding of the court below, the basis for Blundo's meeting the "situs" requirement of the Act was a work-preservation provision in a labor contract, not anything inherent in the nature of his function. A worker injured while performing the same function as Blundo

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<sup>77</sup> Rule 2, "Rules on Containers", as cited in *ILA, AFL-CIO v. NLRB*, 79 L.C. ¶ 11,496 at 21,168 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3463 (Jan. 11, 1977).

at some other port not covered by the Rules on Containers would not necessarily meet the "situs" requirement as that requirement has been interpreted by the court below. Thus, even among terminal employees performing the same function the coverage of the Act would depend on the terms of the local collective bargaining agreement. In another context the court below recognized that such a result is unacceptable:

Obviously it is not enough that \* \* \* a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards. [Pet. A. 33a.]

The possibility of wide variations among ports in the application of the Act is not merely speculative. Statistics recently published by the OWCP demonstrate clearly that there have been major differences among ports in the impact of the 1972 coverage amendments. Thus, in fiscal year 1976 the "Extended Coverage" of the 1972 amendments accounted for 79% of reported injuries in Baltimore, 73% in Norfolk, and 76% in Houston, compared to only 31% in New Orleans, 28% in San Francisco, and 27% in Honolulu.<sup>78</sup>

***D. An "employee" must be engaged in "maritime employment" at the time of injury.***

The statutory definition of "employee" requires that an individual covered by the Act must be "engaged in maritime employment." § 902(3). As demonstrated *supra*, Blundo's work in removing cargo from containers unloaded several days previously and transported over public streets by a trucking company cannot be considered "maritime employment" or "loading or unloading", as those terms have traditionally been defined. Blundo can satisfy the status requirement of the amendments only if his infrequent work aboard vessels (some

<sup>78</sup> Pet. A. 130a.



20% of his time) is sufficient to make him a "long-shoreman" covered by the Act whatever his duties at the time of injury.

The legislative history of the amendments makes it clear, however, that the status test requires examination of the maritime nature of the claimant's employment *at the time of injury* and cannot be satisfied by some general characterization based upon union membership or previous employment. The Committee Reports from both the House and Senate state the Congressional intent that the Act should not reach "employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters used for such activity." *H.R. Rep. No. 1441, supra* at 11; *S. Rep. No. 1125, supra* at 13. The same point was later made by Representative Steiger in floor debate on the 1972 amendments when he stated that "even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it." 118 Cong. Rec. 36385 (1972) (emphasis added).

Relying on these firm indicia of Congressional intent, three Courts of Appeals, although at odds over other features of the Act, have all agreed that a covered employee must be actually engaged in "maritime employment" at the time of injury in order to recover. See *Weyerhaeuser Co. v. Gilmore, supra*; *Adkins v. I.T.O. Corp., supra*; and *Jacksonville Shipyards v. Perdue, supra*.

These holdings are in accord with the construction given the Act prior to the 1972 amendments. In *Pennsylvania R.R. Co. v. O'Rourke, supra* at 340, this Court stated with regard to the broader pre-1972 "status" requirement that "[a]n injured worker's particular activity at the time of injury determines of course whether

he was injured in the course of his employment \* \* \* and whether he was a member of the crew of the vessel \* \* \*". Moreover, the Court of Appeals for the Second Circuit has previously held, in connection with the broader "status" requirement of the Act which existed prior to 1972, that an employee's duties at the time of his injury determined coverage under the Act:

The employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew. It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as "mate" of the vessel, we hold that he was a crew member, although he might cease to be one on days when he was assigned for other duties. We can perceive no reason in the words or purpose of the Compensation Act for lumping an employee's activities over the period of his employment and classifying him according to the greater number of days on which he was either seaman or longshoreman. [*Long Island R. Co. v. Lowe*, 145 F.2d 516, 518 (2d Cir. 1944).]

Furthermore, this construction is supported by precedents established by this Court in construing a similar "employee" definition in the Federal Employers' Liability Act. As enacted in 1908, the FELA made railroads liable "to any person suffering injury while he is employed by such carrier in [interstate] commerce." 35 Stat. 65. In construing the requirement that the employee be "employed in interstate commerce," this court held in numerous cases that work done at other times was immaterial. *E.g.*, *Chicago & N.W. Ry. Co. v. Bolle*, 284 U.S. 74 (1931); *Erie R.R. Co. v. Welsh*, 242 U.S. 303 (1916).<sup>79</sup>

<sup>79</sup> The statute was later amended to cover all employees any part of whose duties were in furtherance of interstate commerce or had a direct or substantial bearing thereon, 45 U.S.C. § 51, but the "maritime employment" criterion is so similar to the "interstate com-

The at-time-of-injury interpretation also accords with the overriding concern of witnesses at Congressional hearings and of members of Congress with the particularly hazardous nature of the longshoreman's work. *See, e.g.*, 118 Cong. Rec. 36387 (Rep. Hicks); 118 Cong. Rec. 36388 (Rep. Ashley). The repeated emphasis upon the hazards of unloading a vessel makes it unlikely that Congress intended to cover employees engaged in activity which does not encompass any of the risks that make longshoring work one of the most dangerous occupations in the country. *See S. Rep. No. 1125, supra* at 2. Blundo's occupation on the day and at the time of his injury involved none of these peculiar hazards of traditional longshore work, and coverage under the Act should not be extended to him on the ground that on other occasions he may have worked with longshore gangs in the actual loading and unloading of ships.

The court below has held that a worker not engaged in "maritime employment" at the time of his injury may nevertheless be covered by the Act if the worker at other times has "spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel." (Pet. A. 39a-40a.) Quite apart from the difficulty of determining what amounts to a "significant part" of an employee's time, this holding would destroy the uniformity sought by the Act because it would result in a denial of federal coverage to an employee working side by side at the same job with another employee whose "significant" involvement at other times in "taking cargo on or off a vessel" makes him eligible for federal coverage.

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merce" requirement of the original version of the FELA that these FELA cases stand as persuasive authority for a construction of the "employee" status that limits recovery to persons engaged in maritime employment at the time of injury. Any other interpretation would lead to ridiculous results, with longshoremen covered at places and times having absolutely no relationship to their maritime work.

Moreover, as phrased by the court below, the test of coverage would evidently not be satisfied in the case of a worker who spends a "significant part of his time" stuffing and stripping containers, since that function does not qualify as "the typical longshoring activity of taking cargo on or off a vessel." This result, although correct under the test of coverage advanced herein, seems wholly inconsistent with the court's own holding with respect to *Blundo* that stuffing and stripping of containers is "maritime employment."

## II. *Blundo* was not injured at a "situs" covered by the Act.

As discussed *supra*, the 1972 amendments were enacted to abrogate the rigid "water's edge" limitation of federal coverage which had been recently reaffirmed by this Court in *Nacirema* and *Victory Carriers*. The situs at which an injury must occur in order to be compensable, which had previously been restricted to navigable waters and "any dry dock", was expanded to

\* \* \* any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.

Despite the landward extension, a covered site must still have some immediate connection with traditional longshore work on and around ships, a requirement emphasized by the statement in the Committee Reports of both Houses of Congress that the purpose of the shoreward expansion was to eliminate the possibility that federal coverage of a longshoreman would "depend on the fortuitous circumstance of whether the injury occurred on land or over water." *H.R. Rep. No. 1441, supra* at 10; *S. Rep. No. 1125, supra* at 13.

The exact nature of the expanded situs requirements has, however, been the source of considerable dispute in

the Courts of Appeals which have construed the 1972 amendments. The court below indicated that it believed the statute could be read to cover *any* pier, wharf, etc. adjoining navigable waters, whatever the nature of the work customarily performed thereon. Pet. A. 30a, n.19, relying on *I.T.O. Corp. v. Benefits Review Bd.*, *supra*, 529 F.2d at 1083-84.

The Third Circuit has held that the extent of the Act's coverage is "functional not spatial" and that the enumeration of covered areas is not exclusive. *Sea-Land Service, Inc. v. Director, Office of Workmens' Compensation Programs*, *supra*. Two other Courts of Appeals have held that the "customarily used" requirement applies to all situs descriptions preceding it, rather than merely modifying "other adjoining area." *Jacksonville Shipyards, Inc. v. Perdue*, *supra*. The recent OWCP Task Force Report of the Department of Labor gives the statute the same reading, holding that

the "situs" test requires that the injury must occur upon the navigable waters or in an adjoining area customarily used by an employer in loading, unloading, repairing, building, or breaking a vessel. [OWCP Task Force Report at 9.]

Both the structure of the statute and the legislative history support this reading of the situs requirement.

As a matter of internal construction, the use of "other adjoining area customarily used" demonstrates an intent that this qualifying clause apply to all covered sites. Otherwise, it would have been sufficient for Congress to have concluded the list of designated sites with the general statement, "or any adjoining area customarily used \* \* \*." The choice of "other adjoining area customarily used" implies strongly that the specifically designated sites, like those included in the general description, can encompass only locations normally used in loading, unloading, building or repairing a vessel.



Furthermore, the statute imposes liability on an employer only if it has employees "engaged in maritime employment, in whole or in part," upon a situs covered by the Act. The term "maritime employment" should be construed in the Act as including only activities, such as loading and unloading, with "a realistic relationship to the traditional work and duties of a ship's service employment," *Weyerhaeuser v. Gilmore*, *supra*, 528 F.2d at 961. If maritime employment must be carried on by an employee at a covered site before an employer is liable to pay compensation under the Act, a consistent interpretation of the statute demands that the restriction to the maritime activities of "loading, unloading, repairing or building a vessel" be applied to all sites covered by the Act and not merely to "other adjoining areas."<sup>80</sup>

The legislative history of the shoreward extension of the Act supports such a reading of the statute. The Senate Committee Report states that "[t]he bill also expands the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work," thus implying that the "customarily used" qualification is applicable to any covered situs. *S. Rep. No. 1125*, *supra* at 2. Furthermore, in discussing the scope of the shoreward extension, the Committee Reports of both Houses expressed the Congressional intent not to cover those persons not engaged in loading, unloading, repairing or building a vessel "just because they are injured in an area adjoining navigable waters *used for such activity*." *Id.* at 13; *H.R. Rep. No. 1441*, *supra* at 11 (emphasis added). If any pier adjoining navigable

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<sup>80</sup> Cf. *Pacific Coast Longshore Agreement* (July 1, 1975) File No. 5424, U.S. Dept. of Labor, Bureau of Labor Statistics, Office of Wage and Industrial Relations, Division of Industrial Relations, at 2, which covers the movement of cargo so long as it is "at a dock" and under the control of an employer covered by the contract. "Dock" is expressly stated not to include any facility at which vessels do not moor. *Id.* at 9.

waters were a covered situs, the qualification of "used for such activity" would be totally superfluous, since the mere proximity of the pier to navigable waters would be sufficient to raise the prospect of the Act's coverage which the Committee Reports seek to limit.

When the "customarily used" requirement is read to apply to all sites covered by the Act, it is clear from the record that Blundo was not injured at a situs within the statutory definition of situs. The record is unequivocal that the 19th Street pier was never used by ITO or any other "employer" for the purpose of loading or unloading "a vessel." (A. 95). Since the statute requires that a situs be customarily used for loading or unloading "a vessel," rather than for loading and unloading "cargo," the clear implication is that there must be some direct connection between a covered situs and a cargo-carrying ship. The stripping of cargo from containers off-loaded by an unidentified stevedore at an unknown location at some unknown point of time in the past clearly is insufficient to establish this essential relationship with ship-board employment.

Nor can the absence of any loading or unloading activities at the 19th Street pier be overcome by considering the entire ITO "terminal" as a situs customarily used for loading and unloading a vessel. Although the 19th Street and 21st Street piers are located inside the same fence, and although ships are sometimes berthed at 21st Street (A. 64), the difference in the activity carried on at the two pier locations precludes consideration of the 21st Street pier's berthing function as sufficient to establish the 19th Street pier as a site "customarily used" to load and unload a vessel. If the 19th Street pier had been used as a holding station for cargo removed by ITO from ships berthed at 21st Street, the relationship between the two facilities might have been sufficient for "situs" purposes to consider the 19th Street activities as an integral part of the unloading process going on at 21st Street.

However, this was clearly not the case, and the loading and unloading activities of ITO at a different pier cannot supply a sufficient connection between the warehouse-type functions at 19th Street and traditional maritime activity to permit the 19th Street pier on which Blundo was injured to be considered a situs "customarily used" for loading and unloading a vessel.

**III. The Department of Labor's expansive interpretation of the Act's coverage has brought about adverse economic effects which Congress could not have intended.**

The Department of Labor's expansive interpretation of the 1972 coverage amendments must be evaluated in the context of the legislative history of these amendments, which conveys not the slightest expectation on the part of Congress that the amendments would result in the huge increases in claims, compensation payments, and insurance costs which have in fact occurred. The Committee hearings were devoted primarily to the issues of increased benefits and elimination of third-party suits under the seaworthiness doctrine. In connection with these issues, one of the points most frequently mentioned was the impact which the proposed changes would have on insurance costs incurred by employers of longshoremen. In their recitation of support for the elimination of the seaworthiness doctrine, the Committee Reports specifically indicate that Congress was concerned with the increased cost of compensation insurance which that doctrine had caused:

Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. [*H.R. Rep. No. 1441, supra* at 5; *S. Rep. No. 1125, supra* at 9.]

Testimony regarding soaring insurance costs came also from the Secretary of Labor:

The courts have thus emasculated the workmen's compensation system in the longshore industry by removing many of the advantages which made it a forward-looking piece of social legislation. *Because of this, it is becoming increasingly difficult for stevedore companies to obtain workmen's compensation insurance. Very few insurance companies are willing to underwrite a risk which is so unpredictable and can go sky high.* [House Hearings at 48; emphasis added.]

The records of the hearings reflect that, at least among industry witnesses, the increase in weekly benefits was viewed as a trade-off which was agreed to in exchange for elimination of third-party liability under the seaworthiness doctrine. See, e.g., the statement of Mr. James A. Flynn on behalf of the New York Shipping Association and the National Maritime Compensation Committee:

*The Cost of Pending Amendments to the  
Longshore Act*

At my request, the National Council on Compensation Insurance analyzed the various bills pending before the Congress to amend the Longshoremen's & Harbor Workers' Compensation Act. Mr. Roy H. Kallop, the Actuary for the Council, advised me of the following results of his cost analysis (Exhibit G):

1. If S.2318 is enacted *as is*, the federal portion of the insurance rates for classifications involving longshoremen exposure will increase approximately 128%.
2. If S.525 is enacted *without* third party relief it would result in an increase in the federal portion of the rates of approximately 53.4%.
3. If S.525 is enacted *as is*, including its provision for the elimination of the circular liability cases,

there would be only a 7.4% increase in the federal portion of the rates, despite a 70% increase in the maximum weekly benefit level. [*Longshoremen's and Harborworkers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525 and S. 1547 Before the Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., 38-39 (1972).*]

Given this history, it seems highly unlikely that Congress meant to enact coverage provisions which would give rise to soaring insurance costs for stevedore firms, or cause insurance companies to stop writing longshore compensation insurance. Yet that is exactly what has happened, as the Department's recent OWCP Task Force Report has recognized:

Due to the high benefit levels currently provided under the LHWCA, and uncertainty regarding future liabilities under the Act, a large and growing number of insurance carriers have withdrawn from writing coverage under the Longshore Act. Those who continue to write such coverage quote premium rates which many employers feel are excessive. The result is an increase in the number of applications for self-insurance from marginally profitable companies. *The industry asserts, with supporting evidence, that the costs of obtaining longshore coverage—which have increased so dramatically since the enactment of the 1972 amendments—are becoming prohibitive for small firms.* They are substantially affecting the economic position of larger firms, and are creating the gaps in the availability of coverage.

Longshore coverage is difficult to obtain in some areas of the country, particularly on the west coast. The market for coverage for small employers in the State of Washington is now virtually nonexistent.

\* \* \* [81]

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<sup>81</sup> OWCP Task Force Report at 76-77; emphasis added.



A major cause of the increased insurance costs has been the Department's liberal extension of federal benefits to workers formerly covered by state workman's compensation laws. The Director of the Office of Workers' Compensation Programs has recently issued figures which indicate that 57% of all injuries now covered under the Act are covered under the 1972 amendments' "Extended Coverage" as that coverage is interpreted by the Department of Labor.<sup>82</sup> In some ports the percentage is even higher. The 1972 amendments' "Extended Coverage" accounts for 65% of all reported injuries in Philadelphia, 79% of all injuries in Baltimore, 73% of all injuries in Norfolk, and 76% of all injuries in Houston.<sup>83</sup>

This dramatic expansion in the number of covered injuries is in large measure a result of the broad interpretation given to the 1972 coverage amendments by the Department of Labor and some Courts of Appeals. The cases which have recently come before this Court on petitions for writs of certiorari give some indication of the extent to which the Department's interpretations of the new coverage amendments have enlarged the scope of activities and situses covered by the Act. The following are additional examples of cases recently decided by the Benefits Review Board or Administrative Law Judges of the Department of Labor:

1. In *Winchester v. Texports Stevedore Co.*, 4 BRBS 447 (Sept. 20, 1976), the Board held that a gear room located five blocks from the nearest wharf was a covered "situs." Similar extensions of the "situs" requirement were made in *D'Amato v. Ira S. Bushey & Sons*, 4 BRBS 414 (Sept. 17, 1976) (public street and a terminal separated situs of injury from shipyard); *Vitale v. Maher Terminals*, 3 BRBS 467 (May 5, 1976) (fence

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<sup>82</sup> Pet. A. 130a.

<sup>83</sup> *Id.*

and public street separated situs of injury from terminal); *Santumo v. Sea-Land Service, Inc.*, 3 BRBS 262 (Feb. 27, 1976), *appeal docketed*, No. 76-1521 (3d Cir., filed April 20, 1976) (thoroughfare separated situs of injury from main yard).

2. In *Jones v. Newport News Shipbuilding and Drydock Co.*, 4 BRBS 180 (ALJ) (June 23, 1976), the "status" requirement was satisfied with respect to a foundry maintenance employee by evidence that 27.2% of the over-all manhours of the foundry were spent in maritime employment.
3. In *Coppolino v. International Terminal Operating Co.*, 1 BRBS 205 (Dec. 2, 1974), an employee injured while loading paper into an IBM machine in an office was held to be engaged in maritime employment. For other clerical functions held to be "maritime employment," see *Luker v. Ingalls Shipbuilding*, 3 BRBS 321 (Mar. 19, 1976), *appeal docketed*, No. 76-2157 (5th Cir., filed April 29, 1976) and *Farrell v. Maher Terminals, Inc.*, 3 BRBS 42 (Dec. 10, 1975), *appeal docketed*, No. 75-1145 (3d Cir., filed Feb. 6, 1976).
4. Other cases of interest in which coverage was found are *Cappelluti v. Sea-Land Service, Inc.*, 1 BRBS 527 (June 10, 1975) (employee "cannibalizing" containers for scrap and spare parts); *DeMayo v. Transocean Gateway Corp.*, 4 BRBS 9 (ALJ) (Feb. 25, 1976) (employee injured in a fight); *Lee v. Oil Base, Inc.*, 1 BRBS 83 (ALJ) (Mar. 21, 1975) (operator of a factory injured while moving boxes during a flood).

As the foregoing cases indicate, the Department's interpretation of coverage has extended the reach of the Act far beyond what Congress intended when it enacted the 1972 coverage amendments. The direct result has been

a huge increase in compensation payments and insurance costs comparable to if not greater than the increases which Congress sought to curb by eliminating the seaworthiness doctrine. These insurance problems and increased costs have in turn caused or threatened serious economic dislocations on the waterfront of the very sort which Congress attempted to remedy in 1972.<sup>84</sup> This anomalous situation can be corrected only by restoring to the Act the interpretation which Congress had in mind when it enacted the 1972 coverage amendments.

### CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below in this case should be reversed.

Respectfully submitted,

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<sup>84</sup> The economic impact of the Department's expansive interpretation is discussed in greater detail in the *amicus curiae* brief of the National Association of Stevedores. We point out this economic impact not as part of a plea based upon the equities of this case, but rather to demonstrate that the Department's interpretation of the 1972 coverage amendments has led to results which Congress could not conceivably have intended.

Supreme Court, U. S.  
FILED

APR 12 1977

MICHAEL RODAK, JR., CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-454  
\_\_\_\_\_

INTERNATIONAL TERMINAL OPERATING CO., INC.,  
*Petitioner,*

v.

CARMELO BLUNDO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR,  
*Respondents.*

\_\_\_\_\_  
On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit  
\_\_\_\_\_

REPLY BRIEF FOR THE PETITIONER  
\_\_\_\_\_

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On Writ of Certiorari to the United States Court of Appeals  
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**REPLY BRIEF FOR THE PETITIONER**

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1. The tests of coverage advanced by the respondents and by the ILA will lead to confusion, uncertainty, and inconsistency in the application of the Act.

The federal respondent has presented two conflicting interpretations of the amended Act.

On the one hand, it says the 1972 amendments include within their coverage all those meeting the situs test who



physically handle cargo.<sup>1</sup> There is no explanation for this requirement of physical handling, no citation to the Act or the legislative history, and no reason given for the exclusion of those who are directly involved in the loading and unloading process but who do not happen to handle cargo.<sup>2</sup>

On the other hand, the federal respondent also purports to be fully supporting the interpretation of the Act set forth in the many opinions of the Benefits Review Board (BRB).<sup>3</sup> The BRB has never required physical handling as a prerequisite to coverage. On the contrary, the BRB has virtually read status out of the Act by granting coverage to anyone who is injured and who meets the BRB's liberal situs test. For example, in its view a temporary delivery clerk who slips on ice between a parking lot and the time clock is covered, since part of his job is to process paperwork necessary to the delivery of cargo to truckers.<sup>4</sup> An employee who injures his back while replacing special paper in an IBM machine is covered, since the employee's regular job is as a hiring agent and lead foreman, and a part of his duties involves feeding names of hired employees into IBM machines.<sup>5</sup> Even a pipe fitter supervisor who trips over a T-beam while

<sup>1</sup> Brief for the Federal Respondent ("Govt. Br.") 20, 25, 25-26, 41.

<sup>2</sup> The federal respondent leaves unclear what test is to be used to determine physical handling, particularly since it also says that actual duties at the time of an accident are irrelevant. Whether it is enough that an employee has at one time handled cargo, or whether he must have spent the greater part of his working career handling cargo, and in any event how all of this is to be proved at a hearing, are all complications which are conveniently passed over without comment.

<sup>3</sup> Govt. Br. 26, 43-44.

<sup>4</sup> *Farrell v. Maher Terminals, Inc.*, 3 BRBS 42 (Dec. 10, 1975), *rev'd*, No. 75-1145 (3rd Cir., Jan. 17, 1977).

<sup>5</sup> *Coppolino v. I.T.O.*, 1 BRBS 205 (Dec. 2, 1974).

returning to his work shack with his men's signed time cards is covered.<sup>6</sup> The examples could go on and on.<sup>7</sup> When these "status" cases are combined with the BRB's almost limitless view of situs—which would allow coverage, for example, for an accident occurring in a warehouse after cargo had been unloaded and driven across the entire United States<sup>8</sup>—the position of the federal respondent, if it is truly supportive of the BRB, becomes clear. As the Third Circuit recently observed, "\* \* \* it is difficult to conceive of *any* clerical position in maritime employment that would not be covered [under the BRB's reasoning]."<sup>9</sup> The same can be said of any other worker within the broad "maritime" net cast by the BRB and now the federal respondent.

Regardless of which of the two conflicting interpretations the federal respondent is espousing, the keystone

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<sup>6</sup> *Luker v. Ingalls Shipbuilding Co.*, 3 BRBS 321 (Mar. 19, 1976).

<sup>7</sup> Because of the facts in the two particular cases before the Court, we have not dealt here with cases outside the longshore aspect of the Amendments. However, it is instructive that in cases outside the longshore area as well, the BRB's reading of the Act has known virtually no bounds. An example is coverage granted in an accident where the employee was participating in a special scuba diving training program sponsored by the employer to qualify the employee as a diver who could inspect the employer's underwater facilities and structures.

<sup>8</sup> *Santumo v. Sea-Land Service*, 3 BRBS 262 (Feb. 27, 1976), *aff'g* 2 BRBS 209 (ALJ) (Aug. 21, 1975).

<sup>9</sup> *Maher Terminals, Inc. v. Farrell*, No. 75-1145 (3d Cir. Jan. 17, 1977). The coverage test which the BRB has begun to formulate is based on the vague concept of "a claimant's nexus with maritime activity." *Mellado v. Universal Terminal & Stevedoring Corp.*, 5 BRBS 493 (Feb. 24, 1977). The First Circuit would cover employees with "bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act \* \* \*." *Stockman v. John T. Clark & Son*, 539 F. 2d 264, 277 (1st Cir. 1976) (emphasis added). Abstract formulations such as these, arrived at without reference to industry practice, are sure to create great uncertainty in the Act's coverage.

to the position of all respondents is that unloading is a continuous process from the vessel's hold to the consignee's truck, and all (physical?) work related thereto is covered. This in turn requires the respondents to deal with the Congressional Committees' flat statement that the function of "further trans-shipment," once the cargo has been transported to a storage or holding area, is *not* covered by the Act. The respondents attempt to meet this by treating "trans-shipment" as movement *away from the terminal* by the consignee or his agents.

Unfortunately for the respondents, such an interpretation is impossible, because the exact language used by the Committees was:

Thus, *employees* whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered \* \* \*.<sup>[10]</sup>

Even under the respondents' broad view of coverage, it cannot be contended that when Congress referred to "employees" in the context of waterfront employment it had in mind some category of workers other than waterfront employees of waterfront employers. Waterfront employees could never have responsibility for carrying cargo outside the terminal in trucks after the consignee has taken dominion and control over such cargo, and certainly the consignee's truck driver could not be an employee. Therefore, the point the Committees were trying to make would have been totally superfluous and even nonsensical if they were only saying that they did not intend coverage for "employees" who "trans-shipped" outside the terminal. The respondents' crucial interpretation of this unmistakable legislative fiat will thus not stand up, and with its fall goes the whole premise that

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<sup>10</sup> Senate Report No. 1125, 92d Cong., 2d Sess. (1972) ("Senate Committee Report") at 13; H.R. Rep. No. 1447, 92d Cong., 2d Sess. at 11 (emphasis added).

trans-shipment means from within the terminal to outside the terminal.

The *amicus curiae* brief of the International Longshoremen's Association ("ILA") suggests that the Act's coverage should be coextensive with the membership of the ILA's certified collective bargaining units in the Port of New York.<sup>11</sup> The Court below specifically rejected this suggestion:

Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoremen's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards.<sup>[12]</sup>

The issue in the cases before this Court is not whether Blundo and Caputo belonged to a longshore union at the time of injury, or whether the work which they were doing was work which members of a longshore union customarily perform in the Port of New York. Rather, the issue is whether they were directly involved in loading or unloading a vessel. To that issue the employee's union label provides no answer.

It adds nothing to an understanding of these cases, therefore, to point out that in the Port of New York some members of the ILA have engaged in work other than the longshore gang's traditional work of taking cargo on or off a vessel. As the ILA states, the New York Shipping Association ("NYSA") has acknowledged in a petition addressed to this Court in a recent case that *members of the ILA* do perform work on the waterfront which does not involve loading or unloading of

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<sup>11</sup> *Amicus curiae* brief for International Longshoremen's Association ("ILA Br.") 15.

<sup>12</sup> Pet. A. 33a; 544 F.2d 35, 52. See also *Jacksonville Shipyard, Inc. v. Perdue*, 539 F.2d 533, 539 n.17 (5th Cir. 1976), petitions for cert. pending, Nos. 76-641, 76-880, and 76-1166; *Sea-Land Service, Inc. v. Director*, 540 F.2d 629, 639-40 (3d Cir. 1976).

vessels.<sup>12</sup> It so happens, however, that the facts of the case in which the NYSA petition was filed persuasively demonstrate and support the points made in the petitioner's main brief in this case, namely, (1) that the activity of stuffing and stripping containers is essentially a warehousing function which may be performed either on the pier by ILA labor or miles inland by off-pier consolidators; (2) that the geographical location at which the stuffing or stripping of containers takes place does not depend on anything inherent in the nature of the stuffing or stripping operation; (3) that a great deal of stuffing and stripping of containers in fact takes place off the pier; and (4) that at least in the past, as in the case of *Blundo*, stuffing and stripping took place on the pier only because the ILA collective bargaining agreement so required. See Pet. Br. 41-42, 59-60.

Because of the footloose character of the stuffing and stripping function, the rationale of the court below would have the effect of elevating situs of injury (off-pier or on-pier) to the determinative criterion of coverage in all cases involving stuffing and stripping. Moreover, the disparities to which the arbitrary situs distinction inevitably gives rise would now undoubtedly occur much more frequently as a result of the Second Circuit's recent decision striking down ILA contract provisions which in the past have confined in-port stuffing and stripping of containers to locations actually on a pier.<sup>14</sup> The removal of this restriction will presumably encourage employers to conduct stuffing and stripping operations at more convenient, less congested off-pier locations within ports. This will have

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<sup>12</sup> *ILA v. NLRB*, 537 F.2d 706 (2d Cir. 1976), cert. denied, Jan. 10, 1977 (Nos. 76-569 and 76-570). The NYSA statement referred to by the ILA addressees "the traditional work of *ILA longshoremen*" and "*ILA's work jurisdiction*." ILA Br. 5, 6.

<sup>14</sup> *Id.* The restriction required that all stuffing and stripping of consolidated or less-than-trailer-load containers within the fifty mile radius of each port be performed at a pier by ILA labor.



one of two results in terms of the Act: either situs of injury will once again hold sway as the determinant of coverage for large numbers of employees, or the situs test will be abandoned by the courts in order to permit extension of coverage to off-pier locations.<sup>15</sup> Neither result accords with the Act or its legislative history.

The private respondents have posed a hypothetical example which they claim demonstrates an inconsistency inherent in the petitioner's interpretation of the Act. The point of the respondents' hypothetical appears to be that under petitioner's interpretation of the Act there will be differences in coverage between different types of workers performing different functions at the same situs. The petitioner concedes that this is so; indeed the legislative history of the Act expressly contemplates this result.<sup>16</sup> What the Act does not contemplate, and what

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<sup>15</sup> Already the Act's situs requirement has begun to show signs of the strain of accommodating the BRB's expansive definition of employment status. For example, in the recent case of *Mellado v. Universal Terminal & Stevedoring Corp.*, *supra*, the Board held that a "terminal laborer" injured while stuffing a container is covered by the Act regardless of the situs of his injury: "[O]nce a claimant's nexus with maritime activity is established his right to benefits under the Act should not be denied \* \* \*."

Thus the certainty of application which is claimed by the federal respondent (Govt. Br. 39 n.7) as a benefit of the Board's expansive view of coverage is in fact an empty promise. Even the Act's situs requirement, which Congress obviously intended to serve as a clearly defined outer boundary of coverage, has now been transformed by the alchemy of the Board's reasoning into part of a vague maritime "nexus" test. The elements of the Board's maritime "nexus" test are extremely unclear, but the test looks very much like a federal mirror-image of the confusing "maritime but local" distinction discarded by this Court fifteen years ago in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). *See also King v. Lavino Shipping Co.*, 5 BRBS 497 (Feb. 25, 1977); *Sea-Land Service, Inc. v. Director*, *supra*.

<sup>16</sup> "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." Senate Report at 11.

is directly contrary to the very purpose of the 1972 amendments, is a situation in which there is a disparity in coverage between workers performing the *same* function at the *same* stage in the cargo-handling process. Yet respondents' interpretation of the Act would create just such disparities. Thus, under respondents' theory (1) Caputo is covered but the consignee's truckdriver, who is required to work alongside Caputo loading the truck (A. 37-38), is presumably not covered;<sup>17</sup> (2) Blundo is covered, but another worker at an off-pier warehouse checking the contents of an identical container unloaded from the same vessel is not covered; (3) Blundo and Caputo are covered, but state or local government employees who perform precisely the same terminal operation functions at another facility or port are not covered (thus, incidentally, giving the state or local government a substantial cost advantage over private concerns).

These are the disparities, not the ones in the private respondents' hypothetical, that Congress sought to avoid.

**2. The longshore industry practice with respect to "point of rest" confirms petitioner's view of the loading/unloading process.**

Respondents do not seriously dispute the proposition that in industry practice "point of rest" is a commonly understood term which serves to separate the work of the longshore gang which loads or unloads a vessel (stevedore function) from the work of the warehouse

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<sup>17</sup> Although the respondents appear to believe that the consignee's truck driver is not engaged in "maritime employment" when he picks up cargo from the terminal (e.g., Govt. Br. 19 n.12), they do not explain how they reach this result under their view of coverage. For example, the federal respondent's statement that the Act covers "all physical cargo handling activity anywhere within an area meeting the situs requirements" (Govt. Br. 20) would appear to apply perfectly to the Teamster truck driver picking up or delivering cargo so long as he is in some terminal somewhere.

employee who handles cargo before it is loaded or after it is unloaded (terminal operation function). Indeed, the *amicus curiae* brief of the ILA virtually concedes that "point of rest" is a fact of life in longshore cargo handling.<sup>18</sup>

Yet despite this fact, and despite the clear explanation of point of rest in petitioner's main brief, the federal respondent in its brief has seriously misconstrued the significance of point of rest, treating it in effect as an aspect of *situs*. The result is that most of what the federal respondent has to say about point of rest is not even responsive to the petitioner's position.<sup>19</sup> Thus, the federal respondent's warnings about "shifting" coverage<sup>20</sup> and its reference to "waterfront workers whose daily work carries them from one side of the 'point of rest' to another"<sup>21</sup> betray a complete failure to recognize that "point of rest" helps to *eliminate* "shifting" coverage by defining the loading and unloading process in a functional rather than a geographic sense.<sup>22</sup>

Respondents' second argument with regard to the point of rest concept is that it should not be considered by this Court because the words "point of rest" do not appear in the Act or in the Committee Reports.<sup>23</sup>

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<sup>18</sup> ILA Br. 20 n.8. See also *id.* at 21.

<sup>19</sup> See Govt. Br. 30-39.

<sup>20</sup> Govt. Br. 12, 30, 36, 37, 38, 39.

<sup>21</sup> Govt. Br. 37.

<sup>22</sup> A member of a longshore gang engaged in unloading cargo from a vessel to the cargo's point of rest on the pier has the *status* of a covered employee, and he retains that status regardless of whether his physical location is landward or seaward of the point of rest.

<sup>23</sup> Brief for the claimants Blundo and Caputo ("Cl. Br.") 26; Govt. Br. 37-38; ILA Br. 13 n. 7.

The simple answer to this argument is that the Committee Reports describe the point of rest concept when they set forth the "typical" process of unloading a vessel:

\* \* \* [C]argo, whether in break bulk or containerized form, is typically unloaded from the ship and *immediately transported to a storage or holding area* on the pier, wharf, or terminal adjoining navigable waters.<sup>[24]</sup>

That Congress spelled out the concept of "point of rest" without using those precise words is hardly a point in respondents' favor, in view of the fact that Congress did not spell out even the *concept* of the all-inclusive coverage test argued for by the respondents, but instead repeatedly used statements in its Reports which specifically contradict respondents' all-inclusive test.

Congress' understanding of the loading/unloading process is crucial because the main issue in this case is the meaning of the terms "loading" and "unloading" as they appear in the Act and the Committee Reports.<sup>25</sup>

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<sup>24</sup> Senate Committee Report at 13 (emphasis added).

Although respondents contend that this reference is no more than an "example" of covered activity, the fact is that Congress was well aware of the nature of the "typical" longshore unloading process (*i.e.*, the process of unloading break bulk or containerized cargo), and that Congress defined that process, as does the petitioner, in terms of the "storage or holding area" to which cargo is "immediately transported" as it leaves the vessel.

<sup>25</sup> *E.g.*:

The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel

\* \* \*

\* \* \* [C]heckers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.

Senate Committee Report at 13.

It is the petitioner's position that the meaning of these terms is apparent from the face of the Committee Reports themselves. But if the Reports were ambiguous, as the federal respondent appears to contend, what better source of clarification would there be than the settled practice and usage of the very industry to which the Act relates? <sup>26</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974); *O'Hara v. Luckenbach S.S. Co.*, 269 U.S. 364, 370-71 (1926).<sup>27</sup>

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<sup>26</sup> The federal respondent's search for clarification leads, inexplicably, to the legislative history of a completely different statute—a statute which was held unconstitutional by this Court over fifty years ago. See Govt. Br. 27. It is interesting to note, however, that the old legislative history referred to by the federal respondent demonstrates plainly that Congress did *not* consider "moving articles from one point on the dock to another" to be "directly part of the process of loading or unloading a ship \* \* \*." This of course supports petitioner's position that checkers, such as Blundo, who are involved in such terminal operation functions are not "directly involved in the loading or unloading functions."

<sup>27</sup> The ILA has asked the Court not to consider the survey of stevedoring and terminal operation practices which was prepared by the NAS and which is cited, among numerous other authorities, in support of Point I of petitioner's main brief. The information on the longshore industry which is contained in the NAS survey is information of which this Court may properly take judicial notice. *Parker v. Brown*, 317 U.S. 341, 363-67 (1943). Although the NAS survey was first presented to the BRB nearly three years ago, and although it has been relied upon and referred to in the course of several administrative and judicial proceedings since that time, neither the Department of Labor nor the ILA has ever presented evidence which contradicts the information contained in the NAS survey. Indeed, in at least one judicial proceeding, before the Fourth Circuit, the NAS survey was relied on by the Department of Labor as well as by NAS. Supplemental Brief of Director, Office of Workers' Compensation Programs at 14-16, filed on rehearing *en banc* in *I.T.O. Corp. v. Benefits Review Board*, 529 F.2d 1080, on rehearing *en banc*, 542 F.2d 903 (4th Cir. 1976), *petitions for cert. pending*, Nos. 76-706 and 76-730.

There can be no serious question as to the reliability of the NAS survey. Much of the information contained therein is derived from collective bargaining agreements to which the ILA is a party and



The third argument raised in opposition to "point of rest" is based on the statement in the Committee Reports which suggests that the 1972 amendments were in part a response to the advent of "modern cargo-handling techniques" such as containerization.<sup>28</sup> As explained in the petitioner's main brief,<sup>29</sup> the point of this statement is not that stuffing and stripping of containers should be covered under the Act, but that all members of the longshore gang actually engaged in loading or unloading a vessel should be covered whether on the vessel or located on the pier as a result of containerization's shift of much of the gang's work to the pier alongside the vessel.<sup>30</sup>

**3. To be covered under the Act an employee must be engaged in "maritime employment" at the time of injury.**

In answer to petitioner's contention that coverage depends on the nature of employment at the time of

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which are public documents on file with the Department of Labor. Moreover, the information which is contained in the survey has been repeatedly confirmed by independent authorities, most recently in a "Task Force Report" of the Office of Workers' Compensation Programs, the federal respondent herein. The relevant portion of the OWCP Task Force Report, entitled "Nature and Character of the Longshore Industry," has been reprinted as Appendix A to the *amicus curiae* brief filed by the NAS in the instant cases.

This Court has itself long ago recognized the basic conclusion regarding industry practice which is conveyed by the information contained in the NAS survey. *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90, 93 (1937) ("stevedoring services \* \* \* always commence in the hold of the vessel and end at the 'first place of rest,' and vice versa."). The petitioner's main brief contains citations to numerous other authorities to the same effect.

<sup>28</sup> See Cl. Br. 24; ILA Br. 8.

<sup>29</sup> Pet. Br. 17-19.

<sup>30</sup> In its answering brief the ILA acknowledges that containerization has reduced the necessity for shipboard work among "members of the longshore gangs." ILA Br. 16.

injury, the federal respondent refers to a "long line of cases"<sup>31</sup> which, however, stands only for the familiar proposition that whether an injury arises *in the course of employment* does not depend on the injured worker's activity at the time of injury. The requirement that an injury has been incurred "in the course of employment" is an entirely separate provision of the Act<sup>32</sup> which has nothing to do with the definition of "employee" in Section 902(3). Cases holding that an eligible employee is covered by workmen's compensation while on his way home from work, or while eating lunch, or while picking up his paycheck, do not even address the issue of whether the employee is in fact eligible for benefits in the first place. That is always the threshold issue, and it is the issue in the instance cases.<sup>33</sup>

4. These cases should be decided on their merits and not on the basis of "deference" to the BRB's interpretation of the Act.

The answering briefs of both the private and federal respondents contain arguments that this Court should affirm the decision below because of (1) the statutory presumption in 33 U.S.C. § 920(a), or (2) the deference normally due the decisions of administrative agency, or (3) the burden of proof which lies with the employer under the Act.<sup>34</sup> These arguments have already been decisively answered by a number of Court of Appeals

<sup>31</sup> Govt. Br. 41.

<sup>32</sup> 33 U.S.C. § 902(2).

<sup>33</sup> With respect to these cases, it may be observed that in its definition of "employer," the Act itself contemplates that the "maritime employment" status of an employee may be "in part" as well as "in whole." 33 U.S.C. § 902(4). If, as respondents contend, "maritime employment" were an all-or-nothing proposition, the reference in Section 902(4) to employees who are engaged in "maritime employment" only "in part" would make no sense.

<sup>34</sup> See Cl. Br. 11-15; Govt. Br. 43-44.

judges, including the majority below, and even others who may disagree with petitioner's basic position with respect to the Act's coverage.<sup>35</sup> As these judges have pointed out, the "presumption" and "deference" arguments which respondents raise relate to judicial review of *evidentiary* determinations. They have no application where, as here, the controlling facts are undisputed and the issue is solely one of statutory interpretation—an issue peculiarly suited for judicial resolution. Moreover, the principle of judicial deference to administrative agency decisions carries little weight where the agency in question is an "umpiring" or adjudicative body such as the Benefits Review Board, rather than a policy making body invested with special industry expertise.<sup>36</sup>

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<sup>35</sup> *E.g.*, Judges Campbell, Coffin and McEntee, *Stockman v. John T. Clark & Son*, *supra*; Judges Friendly and Oakes, the majority below; Judge Lumbard, dissenting below.

<sup>36</sup> Both respondents also argue, citing *Voris v. Eikel*, 346 U.S. 328, 333 (1953), that their interpretation of the Act's coverage should be accepted because the Act is a remedial statute which must be liberally construed. What this Court said in *Voris v. Eikel*, however, is that the Act "must be liberally construed *in conformance with its purpose*." 346 U.S. at 333 (emphasis added). There is no rule which permits the application of a statute to persons or situations which it was never Congress' purpose to cover. 3 Sutherland, *Statutory Construction* § 60.01 ("The rule of liberal construction will not override other rules where its application would defeat the intention of the legislature or the evident meaning of an act").

CONCLUSION

For the reasons stated herein and in petitioner's main brief, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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